Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

NIBCO, INC.,

PETITIONER,

v.

MARTHA RIVERA, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 17, 2010

QUESTIONS PRESENTED

1. Whether under *Miller-El v. Dretke*, 545 U.S. 231 (2005), a court of appeals must conduct a comparative juror analysis when reviewing a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), even though the comparative analysis was neither raised before nor considered by the trial court below.

2. Whether a court of appeals that identifies a suspected *Batson* problem based on a comparative juror analysis never considered by the trial court can vitiate a 52-day trial without remanding to allow the trial court to consider the new arguments and evidence in the first instance.

RULE 14.1 STATEMENT

The following parties are not listed on the caption but participated in the proceedings below:

> Mao Her, Alicia Alvarez, Eva Arriola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Medina, Mai Meemoua, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, and See Yang.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that NIBCO, Inc. has no parent company. No publicly held corporation owns 10% or more of the stock of NIBCO, Inc.

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PETITION FOR CERTIORARI

In this case a panel of the Court of Appeals for the Ninth Circuit vitiated a 52-day jury trial by second-guessing a trial court's findings under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on new arguments and evidence never raised or addressed below. The court of appeals did not just spot an unpreserved issue and decide to send the case back to a trial court intimately familiar with the jury selection process. Instead, the Ninth Circuit wiped out more than 10 weeks of jury proceedings without the courtesy of a remand. That result is so fundamentally at odds with this Court's precedents, and so contrary to basic notions of proper appellate procedure, that it should not be allowed to stand. The Court's intervention is required to correct the Ninth Circuit's improper doctrinal departures. It is also needed to provide much-needed clarity on an issue over which the lower courts are deeply divided and confused—namely, under what circumstances an appellate court should engage in comparative juror analysis when reviewing a trial court's findings that a party's race-neutral reasons for striking a juror are not pretextual.

This case involves a manufacturing plant owned by petitioner NIBCO, Inc. ("Nibco") that, in 1998, laid off several unskilled workers as part of a broader (ultimately unsuccessful) effort to fix operational problems that were causing the plant to lose millions of dollars each year. One of the reasons the workers were let go is that they had been assigned to production-level positions with the lowest-skilled duties after failing a test designed to

evaluate basic job knowledge and competence. Respondents are a group of those former employees who brought discrimination claims against Nibco, alleging that they were terminated on the basis of their national origin.

At jury selection, Nibco exercised four peremptory strikes against jurors who, among other things, had stated that they or persons close to them had suffered from workplace discrimination or termination. Because three of the jurors were Hispanic, respondents challenged the strikes as racially motivated under *Batson*. That challenge was rejected by the district court, which found that the strikes were not motivated by race and were not purposefully discriminatory. The case then proceeded to trial, which lasted 52 days with more than 30 witnesses and hundreds of pages of documentary evidence. At the end of this lengthy trial, the racially diverse jury unanimously rejected respondents' claims and ruled in Nibco's favor.

Unsatisfied with the jury's verdict, respondents appealed to the Ninth Circuit, raising new arguments supported by new evidence, and urging the court to undertake a new "comparative juror analysis" that was never advanced in or addressed by the district court. Most courts to have reached the question have held that, if arguments in support of a *Batson* challenge are not properly preserved, the arguments are forfeited and may not be raised on appeal. But the Ninth Circuit ruled that a "comparative juror analysis" is always "required on appeal" even when it is "not requested or attempted below." App. 3. Then, instead of giving appropriate deference to the trial court's rejection of the *Batson*

challenge actually raised, the Ninth Circuit effectively evaluated the issues *de novo* based on its own selective reading of the cold record. It concluded that, in its view, Nibco purposefully discriminated in striking one of the jurors, "TG." And it reached this conclusion even though Nibco reasonably explained that it had stricken TG because she had a sister who had been fired, she had previously served on a hung jury, she had filed a worker's compensation claim against her employer, and she had volunteered views about her former employer suggesting that she would not be sympathetic to Nibco's position.

Even more troubling, instead of remanding to the trial court to consider the "comparative juror" evidence that respondents raised for the first time on appeal, and giving the trial court the opportunity to bring to bear its first-hand observations and credibility determinations in evaluating Nibco's reasons for striking TG, the Ninth Circuit simply ordered a new trial. The Ninth Circuit's decision to wipe out the results of a 52-day trial without the courtesy of remanding, on an issue the trial court is in a particularly good position to judge, is plainly improper and inconsistent with basic notions of appellate procedure. If the Court does not grant plenary review, it should summarily reverse.

OPINIONS BELOW

The unpublished memorandum disposition of the court of appeals reversing and remanding for a new trial is reproduced at App. 1. The order of the court of appeals denying rehearing and rehearing en banc is reproduced at App. 67.

The district court's October 8, 2008 bench ruling denying respondents' *Batson* challenge is reproduced at App. 53–58.

JURISDICTION

The court of appeals rendered its decision on March 29, 2010, and denied a timely petition for rehearing and rehearing en banc on May 20, 2010. App. 67. On July 30, 2010, Justice Kennedy extended the time for filing a petition for certiorari to and including September 17, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the U.S. Constitution reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case involves a manufacturing facility in Fresno, California that in the late 1990s was losing millions of dollars each year. Nibco's efforts to save the business resulted in layoffs that ultimately spawned this lawsuit.

A. Nibco's Fresno Irrigation Business

In 1995, Nibco acquired and merged two struggling irrigation businesses in Fresno, California. *See* Ninth Circuit Excerpts of Record ("EOR") 280. Shortly after the acquisition, Nibco discovered serious operational problems at one of the manufacturing plants. Those problems included dysfunctional quality controls, deficient safety policies and practices, inadequate equipment, and poor employee training and skills. Injuries were rampant, technology was outdated, materials were often contaminated because of employee error, and inventory processes were wasteful. EOR 852.

The inefficiencies and operational problems stemmed, in large part, from poor communication between supervisors and workers who lacked necessary training and skills. No less than six languages—English, Spanish, Cambodian, Vietnamese, and two dialects of Hmong—were spoken on the plant floor. *Id.* Even within departments and shifts, workers often shared no common language. Employees thus relied heavily on non-verbal gesturing or on other workers to translate, a practice that disrupted other workers' regular duties. *Id.*

These problems were resulting in steep losses—nearly $3 million in 1996, and over $7 million a year

later. EOR 852–853. Nibco therefore decided to make significant investments in both the plant and its workers in an attempt to turn around the failing business. It overhauled quality controls, implemented a new computerized production system, and began classifying employees by skill level and assigning shifts accordingly. *Id.* In the fall of 1997, Nibco provided its employees with new training materials and administered a series of pass/fail tests designed to ensure that its employees satisfied minimum requirements for job knowledge and competence. EOR 853.

The tests required a basic sixth-grade English ability and were administered to all workers. EOR 852; 2008-10-09 Tr. at 33:10, 38:5–6. The overwhelming majority of the plant's 127 employees were Hispanic and Asian. EOR 852. A majority of the employees passed the tests. EOR 853. A small subset of employees, including respondents, failed them. Respondents were nonetheless given a second and (in some cases) even a third opportunity to take and pass the tests. *See* 2008-10-09 Tr. at 37:16–18.

The employees who failed the tests were assigned to production-level positions with the lowest-skilled duties, but with no reduction in pay or benefits. EOR 853. When the plant continued to hemorrhage money in 1998, however, those lowest-skilled employees were the first to be laid off. By November 1998, Nibco had been forced to reduce its workforce by 60 employees. *Id.* at 37:5–6. Of the 127 employees at the plant, 67 employees (of whom 55 were Hispanic or Asian) survived the layoffs. *Id.* at 37:11–12. Less than a year later, in August 1999,

Nibco sold the plant and closed its Fresno operations. EOR 283, 853.

B. The Trial and Jury Verdict

In October 1999, 23 Hispanic and Southeast Asian former employees with limited English proficiency brought national origin discrimination claims against Nibco under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12940 *et seq.* They alleged that the pass/fail tests were discriminatory and that Nibco should have undertaken the significant expense of hiring translators and purchasing "computer-based translation software" to accommodate respondents' primary languages (Spanish, Hmong, Laotian, and Cambodian). *See* EOR 302, 875, 883.

On October 8, 2008, after a lengthy interval involving an interlocutory appeal on a preliminary discovery issue, the case went to trial. The parties brought forth over 30 witnesses and introduced hundreds of exhibits into evidence. EOR 504–831. On November 26, 2008, after a 52-day trial, the jury returned a unanimous verdict in Nibco's favor and rejected respondents' claims. The jury found by a preponderance of the evidence that Nibco's tests did not have a "disproportionate adverse effect in causing the lay off of Hispanic and Asian employees." App. 60. It further found that Nibco established by a preponderance of the evidence that the tests were "job related and necessary to its business" and that no "alternative employment practice ... would have accomplished the business purpose equally well." App. 64.

C. Respondents' *Batson* Challenge

1. Jury selection took place on October 8, 2008. After the district court's voir dire, the available jury members consisted of 16 Caucasians and five Hispanics. Counsel for both sides then engaged in further questioning and exercised peremptory strikes. Respondents struck five jurors (all of whom were Caucasian); Nibco struck four jurors (one Caucasian and three Hispanics). The final jury thus included two Hispanic jurors.

2. Respondents challenged Nibco's strikes against the three Hispanics—prospective jurors "TG," "RG," and "L"—as racially motivated under *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*'s familiar test, respondents had the heavy burden to prove that Nibco's race-neutral reasons for striking the three jurors were pretextual and that Nibco's peremptory strikes were purposefully discriminatory. *See Hernandez v. New York*, 500 U.S. 352, 358–59 (1991).

Responding to the charge that it had "disproportionately target[ed] Latino people ... to try to remove them from the jury," Nibco provided race-neutral explanations for each strike. App. 49. For example, RG had indicated that her mother, with whom she was very close, was discriminated against at work and continued to speak of that experience. *See* App. 22 (noting that she had discussed her mother's experience "[d]uring the time when it was happening more so than now"). Similarly, L had indicated that both his parents were unemployed, and that his father had been laid off "because of no hours." App. 57.

Nibco gave four reasons for striking juror TG: *First*, TG's sister had been fired by her employer. *Second*, TG had previously served on a hung jury. *Third*, TG had filed a worker's compensation claim against an employer. *Fourth*, TG had expressed positive feelings about a former multi-lingual employer (Frito Lay), gushing in response to a question about her *current* employer that Frito Lay was a "great company" that was "very diverse" with "all different kinds of races" and emphasizing that the employees "all speak different languages" and that the supervisors "spoke different languages also." App. 43; *see also* App. 50 ("[S]he worked in a workplace with many languages, never had a problem. Loved Frito Lay ...."). In addition, in trying to remember his notes on TG, Nibco's counsel initially suggested that, like RG, one of TG's family members had suffered discrimination, but then corrected himself: "Her sister was fired. Her sister had an -- you know, problems with discrimination. Or not --." App. 50; *see also id.* ("I got to remember my notes").

In arguing to the district court that Nibco purposefully discriminated, respondents attempted to rebut *only* the first and fourth reasons for the strike. They argued that Nibco's first reason was irrelevant, arguing that RG "was specifically asked if there was any reason that she could not be fair given [the firing of] her sister" and "said no." App. 51–52. They argued that the fourth reason displayed "bias," objecting to Nibco counsel's "words" in referring to TG's praise of a workplace "where there's more than one language spoken." App. 52. Respondents did not address TG's experience with a hung jury, or TG's filing of a worker's compensation

claim. Nor did respondents complain that Nibco's counsel had mistakenly stated that TG's sister had suffered discrimination. And respondents did not offer or refer to any record evidence relating to other venire-persons to support their position.

2. The district court held that, "[o]n the totality of circumstances," Nibco had a non-discriminatory basis for striking TG and respondents had not carried their burden to prove purposeful discrimination. App. 56. The court noted that TG had filed a worker's compensation claim and that TG had a sister "apparently involved in a termination issue." App. 55. The court also reasoned that, in light of respondents' claims and "the fact that the supervisors are multilingual and she said that worked very well in the workplace" for a multi-lingual employer, there was a rational basis to worry that TG "could impose that experience where she said it was, in effect, a wonderful work environment." *Id.* Being in the best position to judge the credibility of Nibco's explanation for the strike and make first-hand observations, the court concluded that it did not "see this as anything having to do with race." *Id.* The court stated that "quite frankly, it's management versus labor and this is a person who's been making claims against her employer, herself, her sister's involved in a discrimination claim." *Id.*

3. The district court likewise ruled that respondents had not carried their burden to prove that Nibco had purposefully discriminated in striking RG and L. The court noted that RG's mother had been involved in a racial discrimination claim and apparently continued to struggle with the

issues. The court added that RG appeared "very, very quiet" and "in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen." App. 53–54. Similarly, L lived with his father who had recently been laid off due to a lack of work. The court was persuaded that those facts were "sufficiently analogous" to the facts of the case, which involved layoffs resulting from a slowdown in business. App. 57. Accordingly, the court determined that Nibco's race-neutral reasons for striking each juror were not mere pretexts for purposeful discrimination.

D. The Ninth Circuit's Decision

1. Respondents requested reassignment to the same Ninth Circuit panel that five years earlier had sided with respondents in an interlocutory appeal over a protective order in discovery proceedings. Although the two appeals were unrelated and did not involve the same issues, and even though reconvening the first panel would require recalling an out-of-Circuit senior judge, the Ninth Circuit granted respondents' motion. The appeal was thus assigned to a panel consisting of Judge Reinhardt, Judge Hawkins, and Sixth Circuit Judge Siler (sitting by designation). *See* App. 1.

On appeal, respondents sought to introduce, in the form of an "appendix," 20 juror questionnaires (as well as a new declaration) that they had never relied on or argued in raising their challenges below. Relying heavily on the new appendix, respondents argued for the first time that Nibco's stated reasons were "shot through with factual misrepresentations." Appellants' Br. 38 n.26. Respondents further argued that comparative juror

analysis based on the questionnaires purportedly indicated that Nibco treated TG, RG, and L differently from other jurors with similar characteristics or experiences.

2. In a divided opinion, the Ninth Circuit concluded that the district court had "clearly erred" in holding that Nibco's reasons for striking TG were not pretexts for purposeful discrimination. App. 2. The memorandum opinion, joined by Judges Reinhardt and Hawkins, stated at the outset that the appellate court would "review the district court's ruling *in light of [its] review of the juror questionnaires*." App. 4 (emphasis added). Although respondents had the burden to prove purposeful discrimination, the majority flatly rejected any suggestion that respondents were precluded from pursuing arguments on appeal that they "did not specifically point out below." App. 3. There was no forfeiture, the majority reasoned, because *Batson* requires the district court to evaluate proffered race-neutral reasons for strikes in the context of the record as a whole, and "a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below." *Id.*

The court of appeals found what it characterized as "major flaws" in Nibco's proffered reasons for exercising its peremptory challenge. App. 4. The court took issue with the district court's statement that TG's sister had filed a discrimination claim, even as it acknowledged that Nibco's counsel had said "Or not" when mentioning the issue. The court concluded that TG had never said that she loved working in a multi-lingual environment—only

that she loved her former workplace, and that the workplace had been multi-lingual. *Id.* Even though the issue was never raised by respondents, the court of appeals further held that comparative juror analysis undermined any emphasis on TG's worker's compensation claim because four white jurors had also filed worker's compensation claims and were not stricken. *Id.*

The Ninth Circuit then turned to two of Nibco's reasons for striking TG that respondents had also not challenged and that the district court had therefore not reached: TG's "jury experience" and her "sister's dismissal." App. 5. Again invoking comparative juror analysis, the court of appeals determined that TG's jury experience did not distinguish her from "[t]hree white jurors" who "had previous jury experience" and were not stricken. *Id.* The court did not acknowledge or address Nibco's explanation that, unlike the other jurors, TG had served on a *hung* jury. Then, making its own assumptions, the court of appeals opined that TG would not have been biased by her sister's dismissal because "TG believed that" the firing "was her sister's own fault." *Id.*

The Ninth Circuit then proceeded to address the strikes of RG and L, even as it acknowledged that neither strike established that Nibco had intentionally discriminated. The judges expressed skepticism over the relevance of RG's mother's involvement in a discrimination suit, suggesting that RG's bare statement that her mother had "moved on" rather than file a discrimination claim meant that Nibco's reasons for striking RG were suspect. App. 7 n.4. The court likewise questioned

the emphasis on L's father's being laid off, finding insufficient evidence "regarding how Juror L felt about it." App. 6. Both criticisms, in the court's view, undermined Nibco's "credibility with respect to its reasons for striking Juror TG." App. 7 & n.4.

Because its concerns rested on its own cold-record credibility determinations, which depended on new arguments and evidence raised for the first time on appeal, one would have expected the Ninth Circuit to remand to the district court to consider whether the new arguments and evidence would have affected its determination that Nibco's strike of TG did not have "anything ... to do with race." App. 55. The district court, after all, presided over voir dire and was in the best position to judge matters of credibility. The Ninth Circuit instead took the drastic step of nullifying the 52-day trial—about a fifth of the district court's annual work product—and ordering a new one. The Ninth Circuit gave little reason for this radical remedy, except to assert that "just one racial strike calls for a retrial." App. 6 (quoting *Kesser v. Cambra*, 465 F.3d 351, 369 (9th Cir. 2006) (en banc)).

3. Judge Siler dissented, disputing the majority's holding that respondents had carried their burden to show that the district court "clearly erred" in finding that Nibco's reasons for striking TG were not pretexts for discrimination. App. 8. Judge Siler noted that, although Nibco's counsel had mistakenly stated that TG's sister had problems with discrimination, he had "corrected the mistake." *Id.* Moreover, the suggestion that TG "loved working in a diverse workplace" was likely "a subjective thought by counsel" based on TG's

statements that she worked in a diverse workplace and that her former employer was a great employer. *Id.* Nibco's reasons for striking TG were legitimate, not a pretext for discrimination. App. 9.

Judge Siler also criticized the majority's reliance on comparative juror analysis for "comparing apples to oranges." App. 8. Noting that it was pertinent that TG had filed a worker's compensation claim, Judge Siler indicated that it meant little that non-Hispanic jurors had also filed such claims when they lacked "the overall mixture of criteria related by Nibco." *Id.* Judge Siler chastised the majority for comparing, in isolation, TG's previous service on a hung jury with other non-Hispanic juror questionnaires, which indicated juror service, but not service on a hung jury. As Judge Siler explained, the trial court is best-positioned to evaluate the state of mind, demeanor, and credibility of the parties, and its judgment was "entitled to more deference than was allowed by the majority." App. 9. Looking at the totality of circumstances, Judge Siler concluded that the district court could not be said to have "clearly erred" in accepting Nibco's stated reasons for striking TG and holding that respondents had not proven purposeful discrimination. *See id.*

Over the vote of Judge Siler, the court of appeals denied the motion for panel rehearing. The court of appeals also denied rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant plenary review to correct the Ninth Circuit's failure to conduct a proper *Batson* analysis and its radical re-interpretation of established precedents. Plenary review is needed because the decision below is illustrative of widespread confusion and disagreement among the lower courts over the extent to which side-by-side comparisons of white and non-white venire-persons are required in reviewing a trial court's denial of a *Batson* challenge. In particular, as described below, the courts of appeals are deeply divided over the extent to which "comparative juror analysis" should be considered when that analysis has not been raised before or considered by the district court. This petition thus provides the Court with an opportunity to clarify the reach of its prior references to comparative juror analysis, and to provide much-needed guidance on this critical and commonly recurring issue.

Alternatively, if the Court does not grant plenary review, it should summarily reverse. Whatever the role of comparative juror analysis on appeal, it should not be used to vitiate a 52-day jury trial without first giving the trial judge an opportunity to address issues with which he has first-hand familiarity. This was not a habeas case. The district court judge who presided over the voir dire was available to consider issues raised for the first time on appeal and to bring to bear his greater familiarity with the facts. Vitiating the jury trial without remand was a clear departure from the proper course of appellate review. Only a remand for further proceedings would accord with basic

principles of appellate procedure and the well-established deference that appellate courts owe to trial court credibility determinations. If left uncorrected, the decision below threatens to upend settled limits on appellate fact-finding and to encourage the improper use of *Batson* challenges to subvert adverse jury verdicts.

I. The Court Should Grant Plenary Review To Clarify When Appellate Courts Should Conduct A Comparative Juror Analysis When Reviewing A *Batson* Claim.

This Court has generally declined to spell out precise guidelines for *Batson*'s "step three" inquiry—that is, whether the proffered explanations for a peremptory strike are a pretext for "purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Although *Batson* urged trial courts to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" it did not mandate any "particular procedures" for ferreting out pretext. *Batson*, 476 U.S. at 93, 98.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), however, the Court pointed to "comparative juror analysis" as "powerful" and "probative" evidence of pretext. *Id.* at 241, 247 n.6. The Court then undertook "side-by-side comparisons" of black and non-black venire-panelists to determine whether the prosecutor had intentionally discriminated. *Id.* at 241. The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful

discrimination to be considered at *Batson*'s third step." *Id.* The Court also examined the "contrasting *voir dire* questions" posed to black and non-black panelists. *Id.* at 255. Based in part on that analysis, the Court concluded that the prosecution's race-neutral reasons for the strikes were implausible and the state court had clearly erred in finding no discriminatory intent.

In the wake of that decision, and as described below, there has been broad uncertainty over what the "powerful," "probative" nature of comparative juror analysis means in practice for trial courts conducting *Batson* step-three inquiries. This uncertainty, in turn, has spawned broad confusion over whether *appellate* courts are required to undertake comparative juror analysis in reviewing *Batson* step-three findings, or whether ordinary rules of fact-finding apply.

A. The Lower Courts Are Split As To Whether Comparative Juror Analysis Is Mandatory.

The courts of appeals have splintered over (i) whether comparative juror analysis is a mandatory component of the trial court's *Batson* step-three inquiry, and (ii) whether appellate courts are required to undertake a comparative juror analysis even when the issue is not relied on below and the trial court has failed to complete an analysis in the first instance.

At the very outermost extreme is the Ninth Circuit. The Ninth Circuit has made unequivocally clear that comparative juror analysis is mandatory in evaluating *Batson* challenges. *See Jackson v.*

Felkner, No. 09-15379, 2010 WL 2933733, at *1 (9th Cir. July 23, 2010); *Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El II*, 545 U.S. at 231). In fact, the Ninth Circuit has held that a comparative juror analysis "is required *on appeal*" in all cases, "even when ... it was not requested or attempted below." App. 3 (emphasis added); *Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (en banc); *see also id.* at 377 (Rymer, J., dissenting) (objecting that "[n]o evidence was presented, no arguments were offered, no findings were sought" for comparative analysis below).

In the decision below, the Ninth Circuit followed this approach, relying heavily on juror questionnaires that had not been cited to or argued before the trial court to complete its own comparison of TG and empanelled white jurors. The court of appeals concluded that Nibco had purposefully discriminated based in part on the court's conclusion that several white jurors had also filed worker's compensation claims and had previous jury experience—even though respondents never addressed this evidence nor advanced any argument at all about juror comparisons before the trial court. App. 4–5. Under the Ninth Circuit's view, comparative analysis is thus mandatory for *both* trial and appellate courts and cannot be forfeited.

The Sixth Circuit has taken a different approach, urging that comparative juror analysis should be conducted by trial courts but also recognizing that the issue, like virtually every other, may be forfeited. In its view, *Miller-El II* established that the "district court's consideration of the totality of circumstances surrounding a strike

should include ... a comparison between the affected juror as well as others who went unchallenged." *United States v. Odeneal*, 517 F.3d 406, 420 (6th Cir. 2008) (emphasis added); *see also United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir. 2008). Accordingly, when a district court has attempted a comparative juror analysis in the first instance, the Sixth Circuit has considered juror questionnaires on appeal that it believed were required to conduct a complete analysis and then remanded for a re-do of the comparisons. *See Torres-Ramos*, 536 F.3d at 560.

Unlike the Ninth Circuit, however, the Sixth Circuit has also suggested that where the parties have not advanced arguments based on a comparative juror analysis, the arguments are forfeited and the district court is not obligated to conduct its own analysis *sua sponte*. *See United States v. Cecil*, No. 08-5080, 2010 WL 3120027, at *5 (6th Cir. Aug. 10, 2010); *Braxton v. Gansheimer*, 561 F.3d 453, 464–65 (6th Cir. 2009); *United States v. Katuramu*, No. 04-3633, 2006 WL 773038, at *3 (6th Cir. Mar. 28, 2006). Accordingly, where the district court has not attempted the analysis, the appellate court also need not. As the Sixth Circuit has explained, "when a district court conducts comparative juror analysis, it is under an obligation to get it right" but the "district court's failure to undertake it is not necessarily reversible error." *Cecil*, 2010 WL 3120027, at *5.

The Fifth Circuit has adopted yet another approach. The Fifth Circuit has held that in *capital* cases, as in *Miller-El II*, comparative juror analysis is mandatory and not subject to forfeiture. *See*

Woodward v. Epps, 580 F.3d 318, 337 (5th Cir. 2009); *Reed v. Quarterman*, 555 F.3d 364, 372–73 (5th Cir. 2009) (in capital case, *Miller-El II* imposes onus on the court, not the parties, to conduct a comparative juror analysis). At the same time, the Fifth Circuit has indicated that in *non-capital* cases comparative juror analysis is not required if it has not been raised in the district court. *See Woodward*, 580 F.3d at 337 (citing *Wright v. Harris County*, 536 F.3d 436 (5th Cir. 2008); *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993)).

In contrast, the Seventh Circuit has narrowed *Miller-El II* to its facts, suggesting that nothing in the opinion makes comparative analysis mandatory for either district or appellate courts. In *Lamon v. Boatwright*, 467 F.3d 1097 (7th Cir. 2006), the Seventh Circuit upheld a district court's step-three evaluation as sufficient even where—as the dissent pointed out—the district court had made no attempt at side-by-side comparisons. Lamon's case, it explained, was "nothing like *Miller-El II* where a side-by-side comparison ... [led] the Court to conclude that the prosecutor's explanation 'reeks of afterthought.'" *Id.* at 1102; *cf. id.* at 1104 (Rovner, J., dissenting) ("majority distinguishes *Miller-El* on the grounds that we have no side-by-side comparison" when "the trial court engaged in no step-three analysis"). The Seventh Circuit reasoned that so long as the prosecutor's reasons are "honest, even if possibly mistaken," *Batson*'s third step is satisfied. *Id.* at 1102.

Going still further, the Eleventh Circuit has squarely held that comparative juror analysis is not mandatory for either district or appellate courts *and*

that such analysis may be forfeited. In *Hightower v. Terry*, 459 F.3d 1067, 1071–72 (11th Cir. 2006), the court reinstated a denial of a *Batson* claim that this Court had vacated and remanded for reconsideration in light of *Miller-El II*. The Eleventh Circuit expressly held that it was not required to undertake a comparative juror analysis because *Miller-El II* had done so only on account of the unusual "augmented record" before the Court—Miller-El had supplemented the record on habeas with juror questionnaires without objection from the State. *Id.* at 1069, 1071; *see also id.* at 1076 n.6 (Wilson, J., dissenting). Absent that unusual situation, the Eleventh Circuit will consider only "'the evidence presented in ... the proceeding in which the *Batson* objection is raised.'" *Id.* at 1070 & n.6; *see also Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006) (declining to consider comparative juror analysis not presented to trial court).

The precise role of comparative juror analysis in *Batson* step-three inquiries and appellate review is thus the subject of a messy, deep, and well-established split in authority. This Court's review is needed to bring clarity and consistency to this important area of the law.

B. The Ninth Circuit's Doctrinal Innovations Contravene This Court's Precedents.

This Court's review is also warranted because the Ninth Circuit's outlier position goes well beyond this Court's *Batson* precedents and runs counter to well-established principles of fact-finding, forfeiture, and appellate procedure.

1. The Ninth Circuit's Approach Relies On An Untenable Reading of *Miller-El II*.

The Ninth Circuit's decision contends that in *Miller-El II* this Court "made clear that the comparative analysis is required even when it was not requested or attempted in the state court." *Kesser*, 465 F.3d at 361. But *Miller-El II* "made clear" no such thing. In fact, the Court's caveats in *Miller-El II* suggest a far more nuanced and limited understanding of when a comparative juror analysis is required.

In comparing the questioning of black and non-black panel members, *Miller-El II* acknowledged that its comparative analysis rested on juror questionnaires that had been lodged in the habeas record. The Court pointed to the State's acquiescence to, and even reliance on, the lodged juror questionnaires and emphasized that "[w]e have no occasion here to reach any question about waiver." 545 U.S. at 256 n.15; *see also id.* (adding that the State "would fare even worse" if the Court excluded the materials). That unusual, augmented record before each of the habeas courts in *Miller-El II* has been widely cited as confirmation that the decision should not be misinterpreted to establish a new and unusual rule making a component of *Batson* review immune from ordinary principles of forfeiture. *See Hightower*, 459 F.3d at 1069 (unless such augmented record present, normal forfeiture rules apply); *Kesser*, 465 F.3d at 386 (Rymer, J., dissenting).

Indeed, contrary to the Ninth Circuit's conclusions, *Miller-El II* could not have intended to

establish comparative juror analysis as a new mandatory component of *Batson* given its posture on habeas. Had the Court believed that it was establishing a *new* procedural rule, it could not have applied that rule to Miller-El. *See* 28 U.S.C. § 2254(d)(1) (habeas petitions shall not be granted unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"). Instead, *Miller-El II* made clear that it was "simply following clearly established federal law as AEDPA requires"; it was not "alter[ing] *Batson* claims" or "craft[ing] a new legal standard." *Golphin v. Branker*, 519 F.3d 168, 186 (4th Cir. 2008); *see also United States v. Davis*, 609 F.3d 663, 693 (5th Cir. 2010) (denying that *Miller-El II* "change[d] controlling law" governing review of peremptory challenges) (citing *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005)). The Court's comparative juror analysis was simply a "powerful" means of illustrating the specific *Batson* violation at issue. *Miller-El II*, 545 U.S. at 241.

Similarly, this Court's recent decision in *Snyder v. Louisiana*, 552 U.S. 472 (2008), treated comparative juror analysis as illustrative of a *Batson* violation but eschewed any suggestion that comparative juror analysis is mandatory. The Court reasoned that its suspicions about the prosecutor's proffered rationale for striking a black juror—*i.e.*, the juror's "conflicting obligations"—were "reinforced" by a comparison of white jurors who had disclosed similarly conflicting obligations. *Id.* at 483. But the Court pointedly noted the dangers of a "retrospective comparison of jurors based on a cold appellate record ... when alleged similarities were not raised at trial," acknowledging that "an

exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Id.* Nonetheless, no such dangers were present, it explained, because the conflicting obligations issue had been "thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." *Id.*

Even in its decisions invoking comparative analysis, then, this Court has emphasized that it has not reached or resolved any question of forfeiture. To the contrary, this Court has suggested that undertaking comparative analysis in the first instance "on a cold appellate record" may be "very misleading." *Id.* Because the Ninth Circuit has taken the position that, under this Court's precedents, a comparative juror analysis is mandatory and non-forfeitable, intervention is particularly warranted.

2. The Ninth Circuit's Approach Subverts "Clear Error" Review And Violates Ordinary Principles Of Appellate Procedure.

The Ninth Circuit's approach also fundamentally subverts the deferential nature of "clear error" review. Under that standard of review, "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573–574 (1985)). A federal appellate court must give "due regard ... to the opportunity of the trial court to

judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a).

This Court has emphasized that a trial court's decision on the ultimate question of discriminatory intent under *Batson* is entitled to "great deference upon appeal." *Hernandez*, 500 U.S. at 364. Deference to the trial court makes particular sense because the finding "largely turn[s] on evaluation of credibility," *Batson*, 476 U.S. at 98 n.21, and "variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575 (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)). As long as "'there are two *permissible* views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.'" *Hernandez*, 500 U.S. at 369 (emphasis added) (citation omitted).

The trial court's findings here could not be said to be "clearly erroneous." The Ninth Circuit held otherwise only by imposing a heightened burden on the district court radically out of step with this Court's precedents. In reviewing the race-neutral reasons for striking TG, the district court was required to consider "whether the proffered rationale has some basis in accepted trial strategy.'" *Miller-El II*, 545 U.S. at 247. That is exactly what it did. App. 55 ("quite frankly, it's management versus labor"). The district court, moreover, was charged with ultimately focusing on "the *honesty*—not the accuracy—of a proffered race-neutral explanation." *Lamon*, 467 F.3d at 1101. And "[d]etermining whether the reason offered is an honest one turns on in-person credibility assessments which clearly the district court is in the

best position to make." *United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1175 (2010) ("the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor").

The Ninth Circuit thus claimed "clear error" only by wholly second-guessing the trial court's assessments of credibility and demeanor anew—assessments that were notably detailed and fully reasoned, spanning seven pages of the trial transcript. EOR 253–259. The court of appeals, for example, found the suggestion that TG "loved" working in a multi-lingual environment to be clear error only by brushing aside TG's effusive exclamations, straining to parse the transcript, and relying on its own assumptions about TG's likely meaning. It also took issue with the Nibco's counsel's mistaken suggestion that TG's sister had filed a discrimination claim only by disregarding counsel's immediate correction of that misstatement. *See* App. 50 ("Or not"); *see also Rice v. Collins*, 546 U.S. 333, 340–41 (2006) ("[s]eizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible"). And it likewise dismissed Nibco's reliance on TG's previous jury experience on the basis of white jurors' previous jury experience only by omitting the fact that Nibco had noted specifically that TG had served on a *hung* jury. *Cf. United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) ("service on a hung jury was legitimate reason for striking him"). The Ninth Circuit's "comparative" juror analysis thus compared apples

and oranges. Each of these missteps only reinforces the value and importance of deferring to the trier of fact, which is best-equipped to discern discriminatory intent and to evaluate the credibility of jurors and attorneys.

The Ninth Circuit's subversion of "clear error" review is further illustrated by its complete overlooking of respondents' failure to object before the district court to two of the four proffered race-neutral reasons for striking TG. As important as *Batson* is, it is not remotely jurisdictional and no more important than countless other constitutional protections that are routinely forfeited on appeal if not properly preserved at trial. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right ... may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'") (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

It is therefore significant that respondents objected *only* to the relevance of the firing of TG's sister—on which the trial court did not rely—and the bias supposedly reflected in Nibco's phrasing of questions about TG's multi-lingual workplace. Respondents did not address TG's feelings about her multi-lingual workplace, her worker's compensation claim, or her service on a hung jury. *Cf. Rice*, 546 U.S. at 340–41 (criticizing Ninth Circuit panel majority for failing to consider "other permissible and plausible race-neutral reasons" for peremptory strike). By glossing over those failures to object, the Ninth Circuit contravened the well-established

principle that "failure to dispute an explanation to a *Batson* challenge results in waiver of that challenge." *Wright*, 536 F.3d at 438 (citing *Arce*, 997 F.2d at 1126–27); *see also Purkett*, 514 U.S. at 768 ("ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"). That fundamental tenet of forfeiture "'discourages sandbagging and strategic behavior by trial counsel, and provides the prevailing party with notice.'" *Garraway v. Phillips*, 591 F.3d 72, 76 (2d Cir. 2010) (citation omitted).

C. The Issues At Stake Are Important And Recurring.

If left to stand, the decision below gives carte blanche to appellate courts to engage in *sua sponte* juror comparisons and unfettered second-guessing of trial court judgments of credibility, irrespective of the actual arguments and evidence presented to the trial court. The result here—rendering a 52-day jury for naught—dramatically illustrates the importance of the issues, but it is not an isolated case. *See, e.g.*, *Jackson v. Felkner*, No. 09-15379, 2010 WL 2933733, at *1 (9th Cir. July 23, 2010) (applying comparative juror analysis and, without any explanation, ordering habeas relief based on conclusion that prosecutor engaged in purposeful discrimination). The Ninth Circuit's improper approach upends basic principles of deference and forfeiture. It is inefficient and costly, enabling appellate courts to turn back the clock on expensive trials and lengthy jury deliberations based on little more than a "cold appellate record." *Snyder*, 552 U.S. at 483. And it opens the door to results-oriented appellate fact-finding that encourages

courts of appeals to superimpose their own prejudices in *de novo* assessments of the evidence.

Trial courts already struggle to balance the risk that jurors have been stricken for improper discriminatory reasons against the equally significant risk that *Batson* claims are raised to re-litigate claims where the outcome is not to a party's liking. The decision below tips that balance. In effectively compelling trial courts to engage in comparative juror analysis for each *Batson* challenge regardless of the parties' objections—or risk being reversed for failure to do so—the decision below imposes an unrealistic and unduly heavy burden on trial courts to waste resources investigating and ferreting out supposed discriminatory intent, even though the burden is supposed to be on the objecting party to prove purposeful discrimination.

This Court should grant plenary review to ensure that appellate courts review *Batson* findings with the requisite clarity and deference. Just as discriminatory jury selection may "undermine public confidence in the fairness of our system of justice," *Batson*, 476 U.S. at 88, aggressive reliance on *Batson* challenges to evade unfavorable jury verdicts after the fact subverts confidence in the rule of law.

II. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse The Ninth Circuit's Decision To Vitiate A 52-Day Trial Without Remanding For Consideration Of The *Batson* Claim In The First Instance.

If it does not grant plenary review, the Court should summarily reverse. At a minimum, the Ninth Circuit's stunning decision to order a new trial—as opposed to remand—subverts fundamental principles of appellate review and procedural fairness. Having overseen a 52-day trial—approximately one fifth of the judge's work year—and personally overseen the voir dire, the trial court should have been given an opportunity to do its job and to consider the new arguments and evidence raised for the first time on appeal. This was not a habeas case; the trial judge who conducted voir dire was ready, willing, and uniquely able to consider the issues on remand. There is no doubt that in evaluating whether a party has purposefully discriminated, the trial court is in the best position to evaluate the credibility of counsel's reasons for exercising a preemptory strike. The Ninth Circuit's failure to provide the courtesy of a remand should not be allowed to stand.

The Ninth Circuit itself acknowledged that respondents "did not specifically point out below" the purported problems with Nibco's reasons for striking TG that, in its view, made the disposition of plaintiffs' *Batson* challenge clearly erroneous. App. 3. The Ninth Circuit further acknowledged that the comparative juror analysis on which it relied "was not requested or attempted below," and that it based

its assessment on its own independent "review of the juror questionnaires" included in the new appendix. App. 3–4. Given this, even assuming it were appropriate to consider new arguments and questionnaires relied on for the first time on appeal, and the court of appeals found colorable reasons to question the disposition of the arguments actually raised below, the Ninth Circuit should have remanded to afford the trial court an opportunity to weigh the new arguments and evidence and make the necessary credibility determinations.

As this Court has long recognized, an appellate court "is not the proper forum to air [an] issue in the first instance." *Christian Legal Soc'y Chapter of the Univ. of California v. Martinez*, 130 S. Ct. 2971, 2995 & n.28 (2010). "When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves." *Id.* The federal courts of appeals, like this Court, are courts of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005); *see also Martinez*, 130 S. Ct. at 2995 (court on remand "may consider CLS's pretext argument if, and to the extent, it is preserved"); *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (court of appeals "should not have resolved in the first instance" a "factual dispute" not considered by the trial court); 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06 [2] (1982) (when a "trial court fails to make findings ... on a material issue ... the appellate court will normally vacate the judgment and remand").

The importance of a remand is especially pronounced given the fact-intensive nature of the *Batson* step-three inquiry. The "evaluation of [counsel's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez*, 500 U.S. at 361, 364–65. As this Court has emphasized, race-neutral reasons for peremptory challenges often trigger "an evaluation of the prosecutor's credibility" or a "juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance." *Snyder*, 552 U.S. at 477; *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (credibility can be measured by "the prosecutor's demeanor"). Only the trial court has the first-hand understanding of the context in which the peremptory strikes were made, and the broadest appreciation of the totality of the circumstances. The trial judge here, for example, observed that he had been struck by RG's "very strange" and "very, very quiet" manner "in responding to my questions." EOR 254. Beyond noting that RG's mother, whom RG was close to, had experienced employment discrimination, the judge added that "in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen." *Id.* No cold record can provide comparable insights.

Courts of appeals thus consistently remand to allow trial courts to assess arguments and evidence related to *Batson* challenges in the first instance. *See, e.g.*, *Torres-Ramos*, 536 F.3d at 542 (remanding to the district court to evaluate *Batson* step three in light of juror questionnaires); *United States v. Taylor*, 509 F.3d 839, 851 (7th Cir. 2007) (remanding for trial court to articulate reasons for

credibility determination); *Rosales v. Dretke*, 444 F.3d 703, 710 (5th Cir. 2006) (vacating on *Batson* grounds and remanding "to the district court ... to consider additional arguments ... the district court did not reach"); *United States v. Hill*, 146 F.3d 337 (6th Cir. 1998) (same); *United States v. Joe*, 928 F.2d 99, 103–04 (4th Cir. 1991) (remanding where district court failed to make necessary Batson factual findings).

Courts impose the strong medicine of a new trial only in rare and exceptional circumstances where a remand would be futile. For example, courts have ordered a new trial where the district court has previously made clear that it is unwilling to carry out the appellate court's instructions, or where the judge that presided over the trial has died. *See, e.g., Riley v. Taylor*, 277 F.3d 261, 294 (3d Cir. 2001) (en banc) ("we see no reason to order the District Court to provide Riley with an evidentiary hearing that it declined to provide on two prior occasions"); *Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999) (ordering new trial because the trial judge had died). Here, the district court judge who presided over voir dire was available to consider issues never before raised in the district court. Under these circumstances, to wipe out a 52-day trial featuring more than 30 witnesses without a remand is unconscionable as a matter of sound judicial administration. Accordingly, even if this Court does not grant plenary review, it should summarily reverse with instructions to remand for further proceedings before the trial court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 17, 2010

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-15136

MARTHA RIVERA, et al.,

Plaintiffs-Appellants,

v.

NIBCO, INC., an Indiana corporation,

Defendant-Appellee.

Argued and Submitted Feb. 23, 2010
Filed March 29, 2010

Before: REINHARDT, SILER,* and HAWKINS, *Circuit Judges*:

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

MEMORANDUM

Appellants Rivera, et. al ("Rivera"), twenty-three Hispanic and Southeast Asian immigrant workers, brought suit against Nibco, their former employer, alleging that they had been terminated on the basis of their national origin in violation of Title VII of the Civil Rights Act of 1964. A jury returned a verdict in Nibco's favor. On appeal, Rivera contends that the

district court erroneously denied their *Batson* challenge to Nibco's use of three of its four peremptory strikes to remove Hispanic jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Because we conclude that, with respect to Juror "TG,"[1] the district court's denial of Rivera's *Batson* challenge was clearly erroneous, we reverse and remand for a new trial.[2]

I.

This appeal concerns *Batson*'s third step. At this step, the district court was obligated to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may [have] be[en] available" to determine whether Nibco's strikes were motivated by purposeful discrimination. *Batson*, 476 U.S. at 93 (internal quotation marks removed).

As an initial matter, we reject Nibco's argument that Rivera should be precluded on appeal from pointing out flaws in Nibco's proffered reasons that

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[1] In order to protect the potential jurors' privacy, we refer to them by their initials only.

[2] We also deny Nibco's Motion to Strike Appellant's Appendix, and grant Appellant's request to take judicial notice of the completed juror questionnaires. *See United States v. Torres-Ramos*, 536 F.3d 542, 560-61 (6th Cir. 2008) (taking judicial notice of juror questionnaires). We consider the questionnaires not for the truth of the potential jurors' statements, but as evidence of the information that was before Nibco when it made its peremptory strikes. *Cf. Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of magazine articles about paintings at issue in the case as evidence "of what information was in the public realm at the time").

are apparent from the record, but that Rivera did not specifically point out below. Rivera's initial *Batson* challenge "impose[d] on the trial court an obligation to complete the third step of the *Batson* process...." *United States v. Alanis*, 335 F.3d 965, 966 (9th Cir. 2003). "[T]he third step of *Batson* primarily involves the trier of fact," which "must evaluate the record and consider each explanation within the context of the trial as a whole...." *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc); *see also id.* ("[N]either the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or are refuted by it.") (internal quotation marks removed). Moreover, a comparative juror analysis is required on appeal, even when, as in this case, it was not requested or attempted below.[3] *Id.* at 361. We thus review the

[3] At oral argument, Nibco's counsel suggested in response to questioning by the court that a court's obligations in ruling on a Batson challenge might be different in civil and criminal cases. This Circuit has not previously recognized such a distinction. *See Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993) (reversing and remanding for a new trial where district court in § 1983 action failed to conduct a proper Batson inquiry); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (holding that the "same approach" to determining whether the proponent of a Batson motion has established a prima facie case of discrimination "applies in the civil context"); *but see Woodward v. Epps*, 580 F.3d 318, 337-38 (5th Cir. 2009) (distinguishing between courts' roles in ruling on a Batson motion in capital cases as compared to ordinary criminal or civil cases). Because Nibco did not raise this argument in the district court or in its brief on appeal, and because the parties both proceeded throughout this litigation on the basis that the rules and cases applicable to criminal proceedings applied here, we decline to consider the issue at this time.

district court's ruling in light of our review of the juror questionnaires.

II. Juror TG

Nibco gave five reasons for striking TG. The district court accepted three: (1) Her sister had problems with discrimination and had filed a discrimination claim (an assertion that Nibco's counsel had qualified by adding, "or not"); (2) She "loved" working with people who spoke different languages; and (3) She had filed a workers' compensation claim. The court did not address Nibco's other two proffered reasons: that TG's sister had been fired and that TG had previously served on a jury that failed to reach a verdict.

The record reveals major flaws in all three of the reasons accepted by the court. First, Nibco's assertion that TG's sister had experienced discrimination, which the district court converted into an assertion that TG's sister had brought a discrimination claim, was completely unfounded and has no support in the record. Second, TG never said she loved working in a multilingual environment. Nibco conflated two unrelated statements in asserting otherwise. Finally, a comparative juror analysis undermines Nibco's credibility regarding its concern with TG's workers' compensation claim: Four white jurors had also filed workers' compensation claims, and Nibco neither questioned them about their claims nor used its peremptory strikes to eliminate them from the jury. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If [a party's] proffered reason for striking a [Hispanic] panelist applies just as well to an otherwise-similar [non-Hispanic] who is permitted to serve, that is evidence

tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

"The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge." *Lewis v. Lewis*, 321 F.3d 824, 831 (9th Cir. 2003); *see also Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) ("[The] proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent."). Here, all of the reasons accepted by the district court either lack support in the record or are thoroughly undermined by a comparative juror analysis.

The remaining two reasons offered by Nibco, which the district court did not address—TG's jury experience and her sister's dismissal—are also seriously flawed. Three white jurors had previous jury experience, including one who said she had trouble "judging others," but Nibco did not find that to be a basis for striking, or even questioning them during voir dire. And it is implausible that TG would have been biased by her sister's dismissal: the record shows that TG believed that it was her sister's own fault, because she missed too much work.

Under these circumstances, and taking into account the fact that Nibco used its strikes disproportionately against Hispanic jurors in a case involving claims of national origin discrimination against Hispanic workers, *see United States v. Esparza-Gonzalez*, 422 F.3d 897, 905 (9th Cir. 2005) (stating that the racial element inherent in a trial is a fact "that should also be considered when evaluating whether the totality of the circumstances

gives rise to an inference of discriminatory intent"), the district court's conclusion that Nibco's proffered reasons were not pretexts for discrimination was clearly erroneous.

III. Juror "L"

"Because just one racial strike calls for a retrial," it is not necessary to determine whether there were genuine, non-racial reasons for striking the other two jurors. *Kesser*, 465 F.3d at 369. It is relevant, however, that Nibco's proffered reason for striking Juror L is highly questionable, "mak[ing] it even harder to believe that [its] reasons for striking [Juror TG] were race-neutral." *Id.*

Nibco's only proffered reason for striking Juror L was that he lived with his father who had been recently laid off due to a lack of work. Nibco's counsel stated that Juror L "indicated that ... the experience of his father getting laid off was something that bothered him and he was concerned about that." Counsel repeated three times that Juror L lived with his father and twice stressed that the lay-off was recent.

The record confirms that Juror L's father had been laid off. However, neither the court nor the parties asked him about the lay-off during voir dire (in fact, neither party asked him any questions at all), and there is no evidence in either the voir dire transcript or the juror questionnaires regarding how Juror L felt about it. Nor is there any evidence that the lay-off was recent, or that Juror L lived with his father. Nibco's lack of foundation for its assertions is troubling. Although on its own, it would not necessarily require a finding of intentional discrimination with respect to Juror L, it further

undermines Nibco's credibility with respect to its reasons for striking Juror TG.[4]

IV.

Nibco's stated reasons for striking juror TG were implausible, unsupported by the record, and/or undermined by a comparative juror analysis. Accordingly, the district court erred in finding that they were not pretext for intentional discrimination. We therefore REVERSE and REMAND for a new trial.

REVERSED and REMANDED.

SILER, Circuit Judge, dissenting:

I respectfully dissent from the majority. Even though the procedure in a *Batson* challenge seems to be a pitfall for the district courts, *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc), requires the district court to consider each explanation within the context of the record, regardless of whether relevant portions of the record are brought to its attention by the movant. Therefore, in light of

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[4] Nibco's proffered reason for striking the third Hispanic potential juror, RG, was similarly problematic. Nibco asserted that RG's mother had been involved in a discrimination suit against her former employer. However, the record reveals that RG's mother had experienced discrimination at work and then "just moved on." As with Juror L, this inconsistency may not so undermine Nibco's credibility with respect to its reasons for striking Juror RG that it compels a finding of intentional discrimination with respect to her, but it provides further evidence of intentional discrimination with respect to Juror TG. *See Kesser*, 465 F.3d at 368-69.

Kesser, I concur with the majority in its denial of the motion by Nibco to strike appellants' appendix and its granting the request to take judicial notice of the completed juror questionnaires as tendered by the appellants.

I part company with the majority with regard to its determination that the district court clearly erred in finding that the stated reasons by Nibco for striking Juror TG were not a pretext for intentional discrimination. As the majority states, the district court accepted three reasons for striking TG and did not address the two other reasons. Although Nibco's counsel made a mistake when he claimed that TG's sister had problems with discrimination, counsel apparently corrected the mistake when he said "or not." The sister had not indicated any problems with discrimination, but she had been fired for calling in to be excused too many times. TG said it was her sister's own fault that she was fired, but that does not show discrimination. Counsel also said that TG "loved working" with people who spoke different languages. TG did say that she worked in a diverse workplace for Frito Lay and that she got along with everyone. She also said that Frito Lay was a great company to work for and that she had no grievances with it. The suggestion that she loved working in a diverse workplace was probably a subjective thought by counsel. She also had filed a workers' compensation claim, as did some of the non-Hispanic jurors. Although four non-Hispanic jurors also filed workers' compensation claims, they did not have the overall mixture of criteria related by Nibco. Consequently, the majority's comparative juror analysis is an exercise in comparing apples to oranges.

Finally, Nibco indicated that TG had previously served on a jury that failed to reach a verdict. Although comparing just one of these criteria with the criteria found in a non-Hispanic juror questionnaire might lend credence to a determination that there was discrimination, when all of these factors were related about TG, the district court did not clearly err in finding a non-discriminatory motive in striking TG. Evaluating the state of mind of Nibco's counsel, based on demeanor and credibility, "lies peculiarly within a trial judge's province." *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). Thus, the district court's determination of no discriminatory animus is entitled to more deference than was allowed by the majority.

Because the majority does not indicate that the district court clearly erred in finding no discrimination in the striking of Juror L or RG, I do not discuss those jurors nor the criteria used in striking them. For the reasons stated heretofore, I would find that the district court did not clearly err in finding no discriminatory intent in striking certain jurors. I would affirm the district court.

Appendix B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. OLIVER W. WANGER, JUDGE

MARTHA RIVERA, et al.,	)	
Plaintiff,	)	No. 99-CV-6443-OWW
vs.	)	JURY TRIAL - DAY 1
NIBCO, INC., an Indiana corporation,	)	JURY SELECTION
Defendant.	)	
	)	

Fresno, California Wednesday, October 8, 2008

REPORTER'S TRANSCRIPT OF PROCEEDINGS

KAREN LOPEZ, RMR-CRR
Official Court Reporter
CSR No. 5816

* * *

MR. HAHESY: Good afternoon, ladies and gentlemen.

I'm going to start off by asking a few questions that are general to all of you. And then I have a few that I'd like to ask you individually.

Kind of want to follow up on a comment you made, Mr. Nunez, about a doctor's note for damages. If you were trying to decide whether to award damages for emotional distress and all you had was the person's word, there was no medical evidence, nothing else,

just their word, would that -- would you have a hard time in that situation giving an award of emotional distress?

PROSPECTIVE JUROR NUMBER NINETEEN: It would be like the judge said, follow the law.

MR. HAHESY: So you'd be able to follow the law?

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

MR. HAHESY: And how about you, Mr. Stanford, you had an opinion on that earlier about if it came down to needing some more evidence, would you need more than someone's word about whether they suffered stress or not before you'd be willing to give them damages?

PROSPECTIVE JUROR NUMBER EIGHT: I don't think that was me, but I'll tell you my answer is I think I'd just follow the law. I'd have to. I'm required by law to follow the law.

MR. HAHESY: So all of you --

PROSPECTIVE JUROR NUMBER EIGHT: That's what I'm here for.

MR. HAHESY: -- would be willing to follow the law, whatever it was, and both the plaintiffs and the defendant would be on the same footing in terms of your decision, is that right?

Now, Mr. Brooks, you were asked a few questions by Mr. Smith about language issues. And in the workplace that you're in now, what are the languages that are spoken?

PROSPECTIVE JUROR NUMBER THREE: English and Spanish.

MR. HAHESY: And Mr. Stanford, you mentioned, you know, you're in the electrical field.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

MR. HAHESY: And what languages are in your workplace that you --

PROSPECTIVE JUROR NUMBER EIGHT: Our official job description says must read, write and speak English.

MR. HAHESY: Mr. Smith's questions to you mainly focusing on Spanish and English. Have any of you ever worked in a workplace where there may be five or six different languages spoken? Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: Yes. I was active duty Navy, so there was a whole pot full of different languages that were speaking. But it was always the primary, they of course needed to know English.

MR. HAHESY: So in the military, your military experience, people would be able to speak their own language, but they had a requirement that they had to be able to speak basic English.

PROSPECTIVE JUROR NUMBER ONE: Right. Speaking the other language would be on their own, talking to their friends or, you know, in that capacity. But at work, they had to speak English.

MR. HAHESY: Ms. Hyer, did you raise your hand?

PROSPECTIVE JUROR NUMBER ELEVEN: Yeah, basically being a bank teller, you confront people that speak every type of language coming in and they want to either cash their check or deposit or whatever. So you're talking everything from Russian to Hmong to German to Spanish. And

English. And it is difficult. And sometimes you really don't know what they want to do. Do they have an account? Do they not have an account? You know, they say cash. No, they wanted a deposit. So it's -- yeah, you meet all kinds.

MR. HAHESY: Anybody else have any -- Ms. Lucas.

PROSPECTIVE JUROR NUMBER NINE: I was a flight attendant for Untied Airlines so our main focus was English. But we had others who spoke other languages who translated on the aircraft. But we had to read and write English.

MR. HAHESY: And Mr. Veldstra, did you --

PROSPECTIVE JUROR NUMBER SEVEN: Yes. Obviously being a police officer, we dealt with people from all over the world. And a lot of times they didn't speak English and you improvised.

MR. HAHESY: And can you -- how were your experiences with the improvising?

PROSPECTIVE JUROR NUMBER SEVEN: Well, a lot of times less than satisfactory. But you do what you need to do to adapt and overcome.

MR. HAHESY: Anybody else have any? A number of you on the questionnaire mentioned that sometime or another through your time at work, you'd gone through safety training. Anybody here, the last couple of years, gone through safety training at work. Mr. Dias?

PROSPECTIVE JUROR NUMBER FIFTEEN: We have personnel meetings on how to run the equipment proper and what to -- proper equipment, what to do out in the field to be safe.

MR. HAHESY: Did -- in your job, do you get safety training more often than, you know, once a year?

PROSPECTIVE JUROR NUMBER FIFTEEN: No.

MR. HAHESY: How about Mr. Mello, did you -- you get safety training at Turlock Irrigation District?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah. We have an overall -- at least once a year an overall class and then every ten days I'm retried to give a tailgate meeting to my crew on whatever I decide, you know, depending on what job we're doing at that time.

MR. HAHESY: And you mentioned, I think, do you have people that you work with that speak Spanish?

PROSPECTIVE JUROR NUMBER SIXTEEN: No. My crew is mainly English speaking.

MR. HAHESY: So you're weekly -- or your every ten day training you do in English.

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes.

MR. HAHESY: Anybody else have any recent experience -- Mr. Stanford.

PROSPECTIVE JUROR NUMBER EIGHT: We have routine recurring safety training, everything from CPR, first aid to electrical maintenance to every two weeks we have a briefing within our department of what's going on in all the different monitoring stations and all the accountings in San Joaquin Valley. And everything from office ergonomics to everything. Just pretty general.

MR. HAHESY: Some of that training that you've gone through and sometime does your employer pass out a quiz or test for you --

PROSPECTIVE JUROR NUMBER EIGHT: Oh, yes, sir.

MR. HAHESY: -- to take.

PROSPECTIVE JUROR NUMBER EIGHT: Just about every time.

MR. HAHESY: Anybody else have that same experience. Ms. Tweedy.

PROSPECTIVE JUROR NUMBER THIRTEEN: Being a teacher, we go through like sexual harassment, child abuse, CPR stuff, it's all done on the internet and we do it once a year.

MR. HAHESY: So you access the computer and take the training.

PROSPECTIVE JUROR NUMBER THIRTEEN: Uh-huh.

MR. HAHESY: Do you have to answer some questions throughout the course of the training?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yeah, you have like 20 questions at the end and you have to pass it with 100 percent or retake it.

THE COURT: Mr. Brooks, you had your hand up?

PROSPECTIVE JUROR NUMBER THREE: Yeah, for our men we do tailgate meetings also with our safety manager. Like GAPs, General Agricultural Practices, fruit safety reasons and certain things like that. And she asked questions at the end and whoever gets the answers, they give them something or whatever like that. And then for the managers, we have yearly sexual harassment and CPR trainings.

MR. HAHESY: Do you have an understanding, Mr. Stanford, why you're given the quizzes at the end of the trainings?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

MR. HAHESY: What's your understanding?

PROSPECTIVE JUROR NUMBER EIGHT: It's to enhance your ability to learn what they're teaching. Military taught me that many, many years ago.

MR. HAHESY: Anybody else have any experience with safety training or -- Ms. Keegan.

PROSPECTIVE JUROR NUMBER FOUR: Yes. We have safety training at each of our stores. About once a year usually. And it involves having the quiz afterward. Go over different things at different times.

MR. HAHESY. Now, you work -- you own auto parts store?

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: Does it also do mechanical work?

PROSPECTIVE JUROR NUMBER FOUR: No.

MR. HAHESY: So you sell auto parts and things of that nature?

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: So annually, your company has experience with giving safety training followed by a quiz of some type.

PROSPECTIVE JUROR NUMBER FOUR: Right.

MR. HAHESY: Anybody else? Ms. Garza.

PROSPECTIVE JUROR NUMBER TWENTY: Yes. We have safety training daily at our work actually. Every shift that comes on, they talk about the safety there to, you know, always be safe and everything. And then once a month they do a test. And that's for our records, for our auditors to see, review, to have that we are training our employees out there.

MR. HAHESY: Besides safety training, is there other types of training that you folks go through at times with your employers or handle with your employees? Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: We go through has mat, we go through safety and we go through sexual harassment, sensibility, diversity, all that training. The diversity sexual harassment, as a requirement every year, the has mat and the other safety training that we go through, we do it weekly.

MR. HAHESY: How about Mr. Stanford?

PROSPECTIVE JUROR NUMBER EIGHT: Had several courses from California Highway Patrol on defensive driving. Also had extensive sexual harassment both in the military and civilian repeatedly annually. And some sensitivity training.

MR. HAHESY: Anybody else?

The -- just have a few questions for a few of you individually, just to follow up on some of the questions that Your Honor asked.

MS. BRANNUM. On the questionnaire, one of the questions was asked about your views about whether English should be spoken in the workplace. And you didn't comment on that. I just -- I don't know if you have a comment on that or it just was overlooked

when you were filling out the questionnaire. Do you remember that question?

PROSPECTIVE JUROR NUMBER TWO: Yeah.

MR. HAHESY: Do you have any view about whether English should be spoken in the workplace?

PROSPECTIVE JUROR NUMBER TWO: I don't really have one.

MR. HAHESY: Ms. Garcia, just trying to follow up on a couple of things. And I want to preface this by saying I'm not intending to pry. Okay? Because I know that these questionnaires ask some questions that, you know, people, you know a lot of times doesn't want to go into. And so I'm going to ask at a very general level, but I do need to do it, you know, for purposes of getting the information. You mentioned on your questionnaire that I believe you had experience with either you or someone close to you had been subjected to discrimination or harassment.

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Is that you or somebody close to you?

PROSPECTIVE JUROR NUMBER SEVENTEEN: My mother.

MR. HAHESY: And can you tell me about how long ago that was?

PROSPECTIVE JUROR NUMBER SEVENTEEN: It would be three, four years ago, but it lasted for a while.

MR. HAHESY: And without getting into a lot of detail, I mean, what -- where did your mother work at that time?

PROSPECTIVE JUROR NUMBER SEVENTEEN: She's a secretary for a -- like a rental management company.

MR. HAHESY: And just in general, what was -- what was she experiencing?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Discrimination by her boss. Racial.

MR. HAHESY: And were you -- did your mother share this information with you as she was kind of going through this?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Did your mother end up filing any kind of claim or lawsuit?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No, she just moved on.

MR. HAHESY: And did she -- can you tell us just in general what the discrimination was? I don't want -- I'm not prying, I don't want a lot of detail, just get a little more.

PROSPECTIVE JUROR NUMBER SEVENTEEN: Just a preference. It was made clear preference between one race over another as far as pay and other stuff.

MR. HAHESY: And the races that were involved was which ones?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Mexican and white.

MR. HAHESY: And I take it your mother resolved it by -- by leaving the job; is that what you mentioned?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Uh-huh.

MR. HAHESY: I couldn't --

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Now, you also mentioned that you had -- you or someone close to you had witnessed discrimination or retaliation and harassment at work. Is that -- is this the same instance or is it the different instance?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes, the same.

MR. HAHESY: So these questions that we were asking on the questionnaire about have you or anyone close to you been subjected to these things, that related to your mother?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

MR. HAHESY: Now, you -- one of the questions that you were asked was also about the requirement of speaking English in the workplace. Do you have a view on that?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I can see the point where, you know, to get across everything, okay. But I work with a lot of Spanish speaking and we get along -- you know, we get our word across fine and I am not fluent in Spanish. But we make our points clear and work side by side.

MR. HAHESY: Do you have some fluency in Spanish?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I'm not fluent, no.

MR. HAHESY: All right. Mr. Nunez, that same question was asked of you about your view about whether English should be spoken in the workplace. And I know when you fill these out sometimes they get overlooked or sometimes people just don't want to give a response. Do you have a view?

PROSPECTIVE JUROR NUMBER NINETEEN: I keep it to myself.

MR. HAHESY: All right. The -- when you worked for the -- you were in the military.

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

MR. HAHESY: And did the military have some requirements when you were there about being able to speak certain --

PROSPECTIVE JUROR NUMBER NINETEEN: The Puerto Rican.

MR. HAHESY: Pardon?

PROSPECTIVE JUROR NUMBER NINETEEN: Most of the guys I worked with was Puerto Rican.

MR. HAHESY: You were stationed in Puerto Rico.

PROSPECTIVE JUROR NUMBER NINETEEN: No. Most of the guys I was with were Puerto Ricans, from New York. And more than Spanish. Spanish is a different language. Puerto Ricans speak it. Cubans speak it. So Spanish is all races. Italian, French, same, similar sound

MR. HAHESY: So when you were in the military, kind of like Mr. Hall mentioned.

PROSPECTIVE JUROR NUMBER NINETEEN: Yeah.

MR. HAHESY: A lot of different languages, but --

PROSPECTIVE JUROR NUMBER NINETEEN: Yeah.

MR. HAHESY: -- when they were at work, people had to speak English.

PROSPECTIVE JUROR NUMBER NINETEEN: It didn't matter to me as long as you get the job done.

MR. HAHESY: Ms. Garcia, just a couple more. Are you -- are you close to your mother?

PROSPECTIVE JUROR NUMBER SEVENTEEN. Yes.

MR. HAHESY: I mean, do you see her quite often?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Uh-huh. Yes.

MR. HAHESY: You know, have you -- have you talked to her a lot about the experience she had at the work?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yeah. During the time when it was happening more so than now.

MR. HAHESY: Now, this case involves -- there's 23 women. And would you -- would it be hard for you to put aside your mother's experiences in deciding a case that involved 23 women?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I would have to hear what they would have to say.

What's being presented, you know. There's true, false.

MR. HAHESY: Does anybody -- just because there are 23 plaintiffs, does anybody think that there must be, you know, something to the numbers? I mean, is anybody going to give more credence to one side of the case because there's more people suing than just one person? Anybody?

Regardless of the fact that there's 23 plaintiffs; can everybody assure me that they'll give both sides fair consideration regardless of how many people are bringing the claims?

All right. Thank you.

THE COURT: All right. That completes the voir dire, members of the jury. We're now going to engage in the actual jury selection. If you want to stand up and stretch, you can do that. This will take a few minutes.

(Passing the strike sheet.)

THE COURT: Mr. Hahesy, would you approach, please?

(The following proceedings were held at sidebar between the Court and counsel:)

THE COURT: All right. Mr. Smith.

MR. SMITH: Yes, Your Honor. We would like to raise an issue for cause dismissal of two jurors. Number three, Mr. Brooks, who stated that he could not -- he did not believe that an employer should have to pay anything in damages if they fired someone. That they should be able to fire or layoff anyone without paying damages with the quote we

got from him. So I would like to move to dismiss him for cause.

And Mr. Douglas, who has testified or stated under oath that he would require a doctor's report before he would agree to give anybody emotional distress damages. So those are the two people we think should be dismissed for cause.

THE COURT: Mr. Hahesy.

MR. HAHESY: I disagree. Both of them were later asked would they decide the case based upon the evidence and would they follow the law. Your Honor asked all of them that. And they all indicated they would follow the instructions that were given to them by the Court.

MR. SMITH: Your Honor, may I --

MR. HAHESY: I think they're all basically saying that whatever the evidence is consistent with the law, that's what they'll follow.

MR. SMITH: Counsel did not even ask Mr. Brooks a question about his comment that he believed that an employer should get a free pass laying off someone without having to pay any damages. So he did not rehabilitate him on that issue and didn't ask any questions that were remotely addressed that issue.

And he asked a broad question, not a question specifically to Mr. Douglas, can you all be fair? Can you all follow the law? Well, that doesn't rehabilitate someone who says that he requires a medical doctor's report in order to give emotional distress damages. He did not address that issue directly either, Your Honor. And so we believe there is sufficient basis for cause of dismissal both of those jurors.

THE COURT: All right. Is the matter submitted?

MR. HAHESY: Yes.

MR. SMITH: Yes, Your Honor.

THE COURT: Taking up the matter of Mr. Brooks. Mr. Brooks said that an employer should have the right to get rid of an employee without paying money. And in the context of his statement, it was unclear because it wasn't followed up, whether or not that was for cause termination or a not a form cause termination.

He also, in effect, said that -- and the Court is using my words, not his, because I don't have the transcript in front of me, but it was my sense that he said words to the effect that business is economics and the employer ought to be able to do what is economically in the employer's interest, including terminating people without have to compensate them. And nobody asked him, when you came back, you didn't ask him, well, whether if that were against the law -- I asked the question about violating the law, but I didn't hear his specific answer.

And so I think that the challenge to Mr. Brooks is well taken. Candidly, I had written down for cause myself when I heard his answers. And so I am going to excuse Mr. Brooks for cause.

As to Mr. Douglas, although he definitely said that he would want to have a doctor's proof, he indicated that he would listen to all the evidence and that he would follow the law. And if he is instructed, as a matter of law, that there is no requirement of a doctor's evidence, that was what you didn't include in your question. You didn't say, well, now, after he

said his statement, if you were told that the law doesn't require a doctor's evidence, would you still require it? That would be the cause that he wouldn't follow the law. But I didn't hear him go to that extent.

MR. SMITH: I thought I did ask that, Your Honor. I thought I did specifically ask the question about if you were instructed that that is not a requirement, could you do it? And he still persisted in his no. Maybe I'm incorrect in my recollection.

THE COURT: I heard you ask that question, I'm just not sure if he answered it. Let's see if we can look at that portion of his answer.

(Off the record.)

THE COURT: What we can do is this. I have no problem asking these questions now specifically of Mr. Douglas. We might as well get to the bottom of it now.

MR. HAHESY: Can we ask it of Brooks then?

THE COURT: Sure.

MR. HAHESY: I would like to have it to Brooks before we grant --

MR. SMITH: Well --

MR. HAHESY: I mean --

MR. SMITH: So they want another shot at rehabilitating him after the Court's ruling.

MR. HAHESY: That's the same way with Douglas. I mean, Brooks is the same thing.

MR. SMITH: I don't think so.

THE COURT: I will say this. On Brooks. I wrote "for cause" in my notes.

MR. HAHESY: I know, but he was asked questions before. "Can you be fair? Can you follow the law?"

THE COURT: No, I understand that.

MR. SMITH: Counsel didn't follow up, Your Honor.

MR. HAHESY: Well, you didn't follow up with Douglas.

MR. SMITH: That's a big difference.

THE COURT: All right. Well, if I'm going to be equitable here, although I will have to hear something to change my mind, let me do the questioning. I'll let you follow up if you need to. And we'll see where we are.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen, I want to follow up on questions that the attorneys asked so that we can have a clear understanding of what prospective jurors have intended by their answers. Because it's my duty to make sure that each prospective juror is willing to follow the law. And so if I could, Mr. Brooks, let me ask you about your views.

As I understood your answers, you had said essentially that as a business owner and operator, that you feel it's your right to run a profitable business. If you have to terminate somebody, you want to be able to terminate them and not have to pay damages for that.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: That's the general principle. Now, let's assume that in doing this termination, you do it for a reason that the law says you can't do it for. Even if you think that it's right, the law prohibits it, do you still think, even if the law says that that's not a valid reason, that's not a cause that you can terminate an employee for, that you should not have to be accountable for that if you break the law in terminating an employee?

PROSPECTIVE JUROR NUMBER THREE: Within certain situations, but sometimes -- truthfully, I feel that a lot of times law steps in certain areas that they shouldn't.

THE COURT: All right. And I respect that. Completely. And you're entitled to have your views. But if it is your belief that essentially you should be able to run your business the way you want to without the law interfering, I don't have any criticism of you for having that view, but if that's not the law, then in effect what you're telling us is that you wouldn't follow the law in this case. Do you understand what I'm saying?

PROSPECTIVE JUROR NUMBER THREE: Yeah, I think so.

THE COURT: And is that the way it is?

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: All right. Well then we're going to thank and excuse you. And again, we appreciate -- there are no rights and wrongs here, but we appreciate -- there are no rights and wrongs here, but we appreciate your honesty because we've got to be assured that every juror will follow the law.

PROSPECTIVE JUROR NUMBER THREE: Okay.

THE COURT: So call the number after five on Friday, please.

Now, Mr. Douglas, I want to come back to you on this issue of the damages. You mentioned that you would want to see objective proof of emotional distress. And let me indicate to you generally, I'm not giving you exhaustive definition of the law. If an instruction is given at the end of the case that if somebody's rights are violated, if the law is broken, then one of the things that you may consider is the extent to which there has been mental anguish, mental pain, suffering, humiliation or embarrassment, caused to somebody by an unlawful act, and that you said you would require a doctor's excuse or some kind of objective documentation of that.

First of all, understanding what I've just defined the concept of emotional distress damages as, would you be willing to consider such a claim for that defined type of damage or do you just not believe in that?

PROSPECTIVE JUROR NUMBER SIX: I just have a hard time believing, Your Honor, that somebody can come in here and say, "well, I'm suffering emotional distress." Well, am I supposed to believe what they say? Just because they said it.

THE COURT: Absolutely not. If somebody said I didn't sleep for 20 nights after the event, I lost 14 pounds, I was mad at my children all the time and other matters, that would be evidence that you would consider. If you wouldn't be willing to consider it, then --

PROSPECTIVE JUROR NUMBER SIX: I think they should have took a sleeping pill.

THE COURT: All right. My sense is, from your answer, that it would probably be better for us to get a different case for you to serve on. So we're going to thank and excuse you. And if you would, call the number after five on Friday, Mr. Douglas.

PROSPECTIVE JUROR NUMBER SIX: Thank you.

THE COURT: All right. I'm going to ask that the courtroom deputy fill those two seats.

THE CLERK: John Wenzel.

THE COURT: This is not a race to the seat. We'll ask Mr. --

A PROSPECTIVE JUROR: Would you restate the name, please.

THE CLERK: John Wenzel, W-E-N-Z-E-L.

THE COURT: All right. Mr. Wenzel, if you would take the first seat that was vacated. That's the number three seat up there.

THE CLERK: Justin Gentry.

THE COURT: Good afternoon, Mr. Wenzel.

PROSPECTIVE JUROR NUMBER THREE: Good afternoon, Your Honor.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER THREE: No, I don't.

THE COURT: Any issues raised for you in my questions?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER THREE: I worked for Yosemite Concession Services for 30 years. I'm retired. My wife and I have lived in Mariposa for 27 years. She works at Mariposa Unified School District as the secretary.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER THREE: High school.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER THREE: Yes. I served on the grand jury I think it was about 1993.

THE COURT: In Mariposa County?

PROSPECTIVE JUROR NUMBER THREE: In Mariposa County, yes.

THE COURT: How about on any other jury?

PROSPECTIVE JUROR NUMBER THREE: I vaguely recollect one about 35 years ago. It was criminal.

THE COURT: All right. Was there a verdict?

PROSPECTIVE JUROR NUMBER THREE: Yes. Real fast.

THE COURT: Now, putting aside your jury service, other court experiences?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: How about disputes. Claims being made against you. You making claims. Any kind of business kinds of disputes?

PROSPECTIVE JUROR NUMBER THREE: Other than family matters, no.

THE COURT: All right. Anything about those matters that could affect this case?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Totally separate.

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: Now, how about issues in the workplace? Were there any disputes? Union problems? Any kinds of issues, people claiming their rights were violated by their employer?

PROSPECTIVE JUROR NUMBER THREE: The usual, but they just seem to fade away.

THE COURT: All right. Were you ever in a position where you felt that your rights were being violated?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: You never made any claims?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Did anybody in the workplace ever complain about you?

PROSPECTIVE JUROR NUMBER THREE: No. Not to my knowledge.

THE COURT: All right. Now you've heard what this case is about.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER THREE: I could, yes.

THE COURT: We've discussed this matter of the types of damages that are being sought. Would you consider damage claims?

PROSPECTIVE JUROR NUMBER THREE: If they're reasonable, yeas.

THE COURT: All right. And as to what evidence the law says would or would not be admissible for you to consider, as to whether damages were proved, would you be willing to follow the law?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And when you say "reasonable," tell us what you mean by that?

PROSPECTIVE JUROR NUMBER THREE: Well, not outlandish claims. There are instances where people, you know, they fake things. They go into court and think that they can sue for everything under the sun. That's why we have doctors that can't go into private practice. They have to go into groups because of the high price of malpractice insurance.

THE COURT: All right. You're saying that you would want to have relationship between the harm that is claimed and the nature of the injury?

PROSPECTIVE JUROR NUMBER THREE: Yes, definitely.

THE COURT: You've been listening to the views of other jurors being expressed here in response to questions.

PROSPECTIVE JUROR NUMBER THREE: Yes, I have, sir.

THE COURT: Was there anything that caught your attention that you would want to tell us about that was significant to you?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Do you feel you could be fair and impartial in hearing this kind of a case?

PROSPECTIVE JUROR NUMBER THREE: I feel I could, yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER THREE: Yes. I've had two back surgeries, one July 15th, and because of it, I have nerve compression where my legs are continuously asleep. And driving down today from Mariposa, I had to get out and walk around the car several times to wake up --

THE COURT: It's a physical matter.

PROSPECTIVE JUROR NUMBER THREE: yeah.

THE COURT: All right. We'll thank and excuse you from this case then, Mr. Wenzel. Please call the number after five on Friday.

PROSPECTIVE JUROR NUMBER THREE: Okay. Thank you. Have a good day.

THE COURT: What's left of it.

PROSPECTIVE JUROR NUMBER THREE: What's left.

THE CLERK: Denise Langley.

THE COURT: Good afternoon, Ms. Langley.

PROSPECTIVE JUROR NUMBER THREE: Good afternoon.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER THREE: No, I don't.

THE COURT: Have any of questions raised issues for you?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER THREE: I live in Calaveras County. I've lived there for eight years, although I was born and raised, I left and came back. I'm a financial analyst for a hospital. I have a significant other who I lived with for the time I moved back to San Andreas. He owns a grocery store.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER THREE: College.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER THREE: All criminal.

THE COURT: More than one?

PROSPECTIVE JUROR NUMBER THREE: Three times.

THE COURT: Three times. Did all three cases reach verdicts?

PROSPECTIVE JUROR NUMBER THREE: I believe the one, the first one in LA was settled before we got --

THE COURT: Before you deliberated?

PROSPECTIVE JUROR NUMBER THREE: Right.

THE COURT: So there were two verdicts?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Thank you. How about other experience with courts, putting aside jury service?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: All right. Have you always been a financial analyst or have you had other kinds of work?

PROSPECTIVE JUROR NUMBER THREE: Union issues. I've been through several -- not me personally, but I've -- we went through a layoff at the hospital several years ago.

THE COURT: Was it like a reduction in staff?

PROSPECTIVE JUROR NUMBER THREE: Reduction in the work force, yes.

THE COURT: Yes. All right. Did that produce some dislocation?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And hard feelings?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: On the part of those who were laid off.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. But you were not one who was laid off.

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Did any of that spill over on to you?

PROSPECTIVE JUROR NUMBER THREE: No, not really.

THE COURT: Were you in management then?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And did you have any role in the layoff decisions?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And what role did you have?

PROSPECTIVE JUROR NUMBER THREE: I was pulled into several meetings to -- I work a lot with the productivity for different departments in the hospital. And so I was asked could we cut the number of employees in this department. That sort of thing.

THE COURT: Was yours more a financial analysis than a qualitative work productivity analysis?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Were you in the position of evaluating the individual performance of employees?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: No. Somebody else did that.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Did you essentially say, well, we ought to be able to do this job with four instead of six people?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. But somebody else made the decision upon who would go.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And the merits of those people, whether to retain or to --

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: -- not retain.

All right. Other issues besides that, that you've experienced?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: None?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: All right. You've heard about the nature of the claims here. Do you have any hesitation in being fair and impartial?

PROSPECTIVE JUROR NUMBER THREE: I would do my best to be fair and impartial.

THE COURT: Good. And as to damage claims, do you have any views against damages, would you be willing to consider claims for damages?

PROSPECTIVE JUROR NUMBER THREE: As long as they were reasonable.

THE COURT: All right. And in terms of defining reasonable, how do you approach that?

PROSPECTIVE JUROR NUMBER THREE: I think -- I think if someone has been dealt a bad hand, then, you know, I think the amounts need to be reasonable for what they've been dealt.

THE COURT: All right. And you'd do that based on the evidence in the case?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And your good common sense and judgment.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. do you believe you could e fair ana impartial overall in the case?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: Thank you very much.

Now we're going to ask Mr. Gentry. Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER SIX: Nothing

THE COURT: Have you heard all the questions?

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: Any issues raised?

PROSPECTIVE JUROR NUMBER SIX: I kind of find it hard to believe that they're suing over being discriminated against, but they got hired to begin with. I just feel like it's -- it's nothing to be honest.

THE COURT: All right. And so the plaintiffs start behind for you.

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: All right. Well, let's get a different case for you to serve on. If you would call the number after five on Friday, please.

PROSPECTIVE JUROR NUMBER SIX: Cool.

THE COURT: We'll excuse you. Than you, Mr. Gentry.

THE CLERK: Teresa Gomez.

THE COURT: Good afternoon, Ms. Gomez

PROSPECTIVE JUROR NUMBER SIX: Good afternoon.

THE COURT: Do you know anything about the case --

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: -- or anybody associated with it?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Have any issues been raised for your by anybody's questions?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER SIX: I live in Bakersfield. I've lived there for 18 years. I'm a school bus driver.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER SIX: High school.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER SIX: 27 years.

THE COURT: And what does he do?

PROSPECTIVE JUROR NUMBER SIX: He's a tile setter.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER SIX: Twice.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER SIX: Both

THE COURT: Verdicts in both cases?

PROSPECTIVE JUROR NUMBER SIX: No. No they --

THE COURT: What happened?

PROSPECTIVE JUROR NUMBER SIX: Well, my daughter got sick and was in the hospital.

THE COURT: So you had to be replaced?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: And what about the other case?

PROSPECTIVE JUROR NUMBER SIX: There was no verdict.

THE COURT: Unable to agree?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: Hung jury?

PROSPECTIVE JUROR NUMBER SIX: Hung jury.

THE COURT: Was it a criminal or civil case?

PROSPECTIVE JUROR NUMBER SIX: Criminal.

THE COURT: Criminal. Thank you. How about other experience with the court system?

PROSPECTIVE JUROR NUMBER SIX: I've gone through workman's comp case.

THE COURT: You had your own case?

PROSPECTIVE JUROR NUMBER SIX: Uh-huh.

THE COURT: Was that over a work injury?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And how did that resolve?

PROSPECTIVE JUROR NUMBER SIX: It went well. I got my medical benefits paid and everything.

THE COURT: All right. Did you have a lawyer?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. And did you actually go to a hearing or was it resolved by agreement.

PROSPECTIVE JUROR NUMBER SIX: It was resolved. I didn't -

THE COURT: You didn't have to go to a hearing?

PROSPECTIVE JUROR NUMBER: No.

THE COURT: You didn't appear before an administrative law judge?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: All right. So would your evaluation of the process be that it was fair?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And you're satisfied?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: How about any other court experience besides jury service?

PROSPECTIVE JUROR NUMBER SIX: That was it.

THE COURT: That was it. How about involvement in disputes, like, oh business or have a product that goes bad or get a traffic ticket that's wrong?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Nothing.

PROSPECTIVE JUROR NUMBER SIX: Huh-uh.

THE COURT: All right. Any issues in your workplace, the school bus drivers ever go on strike or --

PROSPECTIVE JUROR NUMBER SIX: Well, I just started that because I worked for Frito Lay. And Frito Lay is very diverse. There's all different kinds of races that work together. And they all speak different languages.

THE COURT: They speak different languages.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And how do they get along in the workplace?

PROSPECTIVE JUROR NUMBER SIX: I never had any problems with anybody.

THE COURT: All right. Do the supervisors speak different languages or do they speak English?

PROSPECTIVE JUROR NUMBER SIX: They spoke different languages also.

THE COURT: All right. You've heard that there are damage claims in this case. Would you be willing to consider claims for damages?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: How about punitive damages?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: You'd consider that. Do you have any views about damages.

PROSPECTIVE JUROR NUMBER SIX: No, not really.

THE COURT: In other words, too little, too much, anything like that?

PROSPECTIVE JUROR NUMBER SIX: It depends on what I heard, you know?

THE COURT: Depend on the evidence.

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: And you're willing to follow the law?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: In this kind of a case, knowing what the case is about, could you hear the case with an open mind?

PROSPECTIVE JUROR NUMBER SIX: Yes, I could.

THE COURT: Is there any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Thank you very much, Ms. Gomez. And we are now going to get the jury selection finished. Unless -- do you wish to inquire?

MR. SMITH: Yes, Your Honor. I do have one or two questions.

THE COURT: All right.

MR. SMITH: That's it.

Good afternoon again. I'm going to make this very quick because I know it's near the end of the day. I just have a couple of questions. And I'm going to direct them to Ms. Langley. If you don't mind, Ms. Langley. I was just reviewing your jury questionnaire. And I notice that you put down that you could not award emotional distress damages. Would you like to tell us about your feeling in that regard, please?

PROSPECTIVE JUROR NUMBER THREE: I just put no because I didn't know what else to put.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER THREE: Sorry.

MR. SMITH: Let me inquire. Do you believe that if someone has a claim that they have emotional injuries as opposed to physical injuries, that emotional injuries can be as real, even though you can't see it?

PROSPECTIVE JUROR NUMBER THREE: Sometimes they can.

MR. SMITH: Okay. And if someone came to your in this case and said, "I have emotional distress damages," do you have any thoughts about what your level or proof requirement would be of them, such as some other members of the prospective jurors who have said I need a doctor's report or whatever. Can you tell us how you feel about that?

PROSPECTIVE JUROR NUMBER THREE: Sorry, I work with doctors all the time. So -- I would probably -- it would depend on their level of convincing me on the stand, I guess.

MR. SMITH: I'm sorry. I'm having a hard time hearing you.

THE COURT: Their level of convincing me.

MR. SMITH: Oh, okay. And when you say level of convincing you, do you mean that you require anything other than just their own word that that is the case?

PROSPECTIVE JUROR NUMBER THREE: No. I just think that I -- it would depend on the person and how they testified on the stand. I mean, it -- if I believed they were truthful, then that's good enough for me.

MR. SMITH: Okay. Let me just ask you a couple of other questions. One other question. I notice you said something about your boyfriend's grocery store. Has there ever been any kind of claim, employment claims that you know about against his grocery store?

PROSPECTIVE JUROR NUMBER THREE: Just worker's comp.

MR. SMITH: Okay. Thank you, ma'am, I have no further questions.

THE COURT: Mr. Hahesy.

MR. HAHESY: Just a few, Your Honor.

Mrs. Gomez, on your questionnaire, you mentioned that you'd had -- you have a sister that had a problem with an employer. Can you tell me about how long ago this occurred?

PROSPECTIVE JUROR NUMBER SIX: Three or four years ago. And it was her attendance. I think I put that down.

MR. HAHESY: Was -- are you -- is this a sister that you're close to?

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. HAHESY: She -- do you remember what actually happened to her with respect to her employment?

PROSPECTIVE JUROR NUMBER SIX: She called off too many times.

MR. HAHESY: And what happened?

PROSPECTIVE JUROR NUMBER SIX: They let her go.

MR. HAHESY: Was there anything about that experience that she told you about that she felt was unfair.

PROSPECTIVE JUROR NUMBER SIX: No. I don't think she should have called off. It was her fault.

MR. HAHESY: So you felt that she was -- that it was her fault that she lost --

PROSPECTIVE JUROR NUMBER SIX: It was her fault that she got fired, yes.

MR. HAHESY: Now, you also mentioned that either you or someone close to you had been involved in bringing a formal grievance, claim or lawsuit against an employer.

PROSPECTIVE JUROR NUMBER SIX: That was my workman's comp case.

MR. HAHESY: That was your workers' comp case.

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. HAHESY: And about how long ago was that?

PROSPECTIVE JUROR NUMBER SIX: 2005

MR. HAHESY: And did you continue to be employed by Frito Lay after that case?

PROSPECTIVE JUROR NUMBER SIX: No.

MR. HAHESY: Did you -- why did your employment with Frito Lay end?

PROSPECTIVE JUROR NUMBER SIX: The job was physically demanding and I -- I couldn't perform that job any longer, so I decided to not to continue working with them.

MR. HAHESY: So other than the workers' comp claim against Frito Lay, did you bring any other type of claim or grievance against --

PROSPECTIVE JUROR NUMBER SIX: No. And I felt that I was, you know, dealt with fair. I mean, I don't have any grievance against Frito Lay. And if I had to recommend them for somebody to go to work with them, I'd say they're a great company to work for. I have no grievances with them. I thought I was dealt with fairly.

MR. HAHESY: The -- you mentioned that you sat on a couple of juries that were not able to reach a verdict. Is that correct?

PROSPECTIVE JUROR NUMBER SIX: That's correct.

MR. HAHESY: One of them you mentioned was a case involving discrimination or harassment.

PROSPECTIVE JUROR NUMBER SIX: A harassment -- it was a harassment case. But that's the civil case that I was dismissed from because my daughter had medical issues and so I left the case.

MR. HAHESY: All right. I have no further questions.

THE COURT: All right. We're now going to complete the jury selection, ladies and gentlemen.

(Passing the strike sheet again.)

MR. SMITH: Your Honor, I'd like to ask to be heard if the judge would allow us to approach for a moment.

THE COURT: Yes, you may approach.

(The following proceedings were held at sidebar with court and counsel)

MR. SMITH: I think we have a problem, Your Honor. I 'd like to make -- lodge a Batson challenge at this point. It seems that they're disproportionately targeting Latino people as to try to remove them from the jury. And I think that under the circumstances, we have no choice but to make a Batson challenge at this time.

THE COURT: All right. Let me see the strike sheet, please.

All right. The defendants have challenged prospective juror number six. All right. Mr. Hahesy, at this time, you have the opportunity to state the reasons for your challenge to each of the prospective jurors.

MR. HAHESY: I can do that. We've got the notes on them here, Your Honor.

THE COURT: Okay.

MR. HAHESY: On each one of them. On Roxanne Garcia, she was involved with a -- with her mother with a discrimination suit recently. She's very close

to her mother. She talked to her mother about that case, you know, regularly. She has regular contact with her mother who was involved in a race discrimination. And, you know, the impression that I developed from her is that there's still some lingering issues related to that case. She also, when she filled out the questionnaire, she didn't indicate, you know, that matter when she completed it and then when Your Honor asked her did she have any issues about discrimination or whatever, there was no question. And then I had to do the follow up to get that issue out. And so, you know, those are the reasons why we decided to strike her.

THE COURT: All right.

MR. HAHESY: Mr. Gomez, I got to remember my notes on Mr. Gomez.

MR. HO: Ms. Gomez.

MR. HAHESY: Ms. Gomez. She had the sister -- similarly she had the sister who was recently involved in the matter. She had had two cases, one of which she actually went to the -- through the trial. She was not able to have a verdict in that case. Her sister was fired. Her sister had an -- you know, problems with discrimination. Or not -- she indicated she filed a workers' comp claim involving the employer. And she has -- if I can remember, my notes on all of Gomez.

She also communicates, she worked in a workplace with many languages, never had a problem. Loved Frito Lay, loved working with all the people of the different languages. And so I felt there's enough ground there on potential bias right there.

MR. SMITH: May I address that briefly, Your Honor?

THE COURT: Yes. Well, let me get the rest of the reasons, then I'm going to let you respond.

MR. HAHESY: And then Lucatero was -- his father was very recently laid off. You know, he indicated that he was not, you know, frankly, I thought comfortable sitting as the juror. You know, he had indicated that, you know, the experience of his father getting laid off was something that bothered him and he was concerned about that. And then in his questionnaire, he indicated that it was a relatively recent layoff. And so given the fact this case involved a layoff.

(Off the record.)

MR. HAHESY: And just as to the Batson, our other strike was to the Caucasian employee. Frankly the plaintiffs have struck all Caucasian jurors. And so, Your Honor, we'd like to make the same Batson motion.

MR. HO: There's only Caucasians --

MR. HAHESY: Everyone they struck is a Caucasian. And so --

THE COURT: All right. Let me first have the response of the plaintiffs to the strikes that the defendant has made of the three Hispanic. And I will find this these are Hispanic jurors, each of them.

MR. SMITH: Yes, Your Honor. Let's start with Ms. Garcia. ms. Garcia stated that her sister had been terminated and then was her sister -- I'm sorry. Ms. Gomez. That it was her sister's fault and that there were no issues with respect to her sister. She was

specifically asked if there was any reason that she could not be fair given what had occurred with her sister. And she said no. There was no reason. Counsel has not advanced anything other than that for Ms. Gomez being dismissed.

And the mere fact that someone such as Ms. Gomez and Ms. Garcia both indicate that they work in a workplace where there's more than one language spoke indicates to me that there is some bias. Just by counsel's own words.

Now, with respect to Mr. Lucatero, Mr. Lucatero did say something about his father. But there was nothing in Mr. Lucatero's answer that indicated any kind of bias, and kind of pre-judged thought or anything else that I think would qualify him from being an exceptional juror in this case.

And the fact that four out of five -- three out of four jurors, prospective jurors are of Latino descent, I think is telling in the case where national origin is part of the claim. The claim in this case involves a significant number of Latina women and counsel has struck at least two Latina women in this case.

MR. HAHESY: Just if I may --

MR. SMITH: Disproportionate to the number of jurors sitting in the box.

MR. HAHESY. Batson gives us -- we get a right to make -- we have a prerogative to make strikes. And since this is a case involving layoffs, and it's also involving employment issues and we've got jurors who have family experiences involving employment issues, one involving a recently layoff of a father, one involving a sister who was terminated from the employment, according to the questionnaire.

We have sufficient prerogative to strike people, especially in employment case, if they've had, you know, those issues. And the law gives us that element of discretion and prerogative. Those are nondiscriminatory reasons for striking a juror.

THE COURT. All right. Let me get my jury sheet.

MR. SMITH: Your Honor, may we have a moment, we're getting our information regarding the jurors we struck.

THE COURT: Yes. Yes, you may. I'll get the information.

All right. Let me rule on these challenges. As I see the composition of the jury, we presently have 15 Caucasian prospective jurors and six Hispanic prospective jurors, although Mr. Veldstra's name could be perhaps Hispanic. He clearly is not Hispanic.

As to Ms. Garcia, the evidence shows that she has a mother who is involved in a racial discrimination claim. I found her manner to be very strange in responding to my questions. She didn't -- she was very, very quiet. I could barely hear her when she was responding. She was, quite frankly, very odd in her presentation and her affect.

She has indicated that, first when asked by me if there were any issues as to discrimination, whether there were any issues in her background. In effect, she did not disclose that there were any. She did not apparently -- I haven't seen her questionnaire, the fact that somebody who she's very close to, her mother, is going through employment discrimination issues of race right now.

And the Court is well satisfied that their are good reasons. I'm just going to say that in 17 and a half years as a trial judge, she is one of the oddest prospective jurors I've ever seen. I don't know whether it's a speech issue or whether it's a communication issue or whether she's just very shy. I'm not in any way being critical of her, but I did find her presentation of herself to be very, very different from anybody on this panel or any panel that I've ever had.

And given the fact that she has issues that, within her closest family, that go to what is in dispute in this case, it is not irrational nor is there any evidence whatsoever of racial animus associated with the challenge.

To the contrary, it would appear that she would likely be a sympathetic juror and someone who would essentially be influenced and affected by what's going on in her life with respect to her mother.

And although the bar seems to have been raised by the Supreme Court requiring a credible justification for the exercise of a peremptory, the Court Does find that as to Ms. Garcia, there is a credible basis on all the grounds stated and therefore the Batson challenge is denied.

As to Mrs. Gomez, Mrs. Gomez is a person who has worked currently as a school bus driver, but formerly as a person in the Frito Lay environment where there were multilingual workers and multilingual supervisors.

She stated that she has had her own workers compensation claim and did not go to trial, but it

went through the system. And she had a lawyer. She did say that she felt that she was fairly treated. She also has a sister who is apparently involved in a termination issue.

Essentially, quite frankly, the Court doesn't see this as anything having to do with race, but quite frankly, it's management versus labor and this is a person who's been making claims against her employer, herself, her sister's involved in a discrimination claim where claims are being made by her against an employer or a co-employee.

And I don't' know what -- to what extent this would be an influencing factor, but the fact that the supervisors are multilingual and she said that worked very well in the workplace at Frito Lay, thee is certainly a rational basis to say that she could impose that experience where she said it was, in effect, a wonderful work environment. It's a great company, she'd recommend it to anybody on this employment environment where, as I understand the evidence, NIBCO didn't have multilingual supervisors and, in fact, imposed this English requirement rather than to speak different languages. And that's going to be an issue in the case. But it's a very good reason for somebody who's found that to be a wonderful context.

MR. HO: If I may just say, Your Honor, there were multilingual supervisors at Nibco, but more to the point, I think there is so many multilingual workplaces in the state; if that were the criteria for exclusions, we would exclude half the possible jurors in the state.

THE COURT: Well, it isn't the only criteria, it is one of three different criteria that have nothing to do,

however, with -- we're focused on her race here. And whether that was the motivation for the challenge. In other words, as long as you have a facially valid reason that has some basis in logic and strategy, because we have eliminated the trial lawyer strategy and the individual experience and trial judgment of the trial lawyer to be able to select jurors and exercising a peremptory challenge, that the lawyer either feels would be favorable to the lawyer's case or unfavorable to the opponent's case.

On the totality of circumstances, I do believe that there is a basis for the exercise of the peremptory as to Ms. Gomez and I'm going to deny the Batson challenge.

As to Mr. Lucatero, really, the only thing we have on him that I can see is that his after was recently laid off. And that I don't have in my notes what the reason for the layoff was of the father.

MR. SMITH: Counsel didn't ask.

MR. HAHESY: The questionnaire indicates he was laid off. He lives with his parents. And this is --

THE COURT: Well, I will tell you that I don't really have enough of a basis. Mr. Lucatero seems to be a fairly straightforward fellow. If that's the only reason, I don't' think that his father's laid off is enough.

MR. HAHESY: Well, his father's laid off, he lives with his father. This is a lawsuit that involves claims relating to layoffs. And so given the nature of his family situation, there's a reasonable inference that could be drawn that he would come into this case with a set of, you know views or judgments relating to this own personal experience that he is

going through now with his family. He lives with his father, you know, and who's been recently laid off.

THE COURT: The problem is you didn't ask whether his father was suffering or whether he's been upset by it, whether there are any kinds of hard feelings or difficulties. Whether he thought it was fair or unfair.

MR. HAHESY: But I have his, you know, questionnaire. I mean, he indicates what the --

MR. SMITH: I disagree that he said -- that Mr. Lucatero said he made any kind of claim.

MR. HAHESY: Father got laid off because of no hours. both his parents are unemployed at this time. And --

MR. HO: There's no claim to be made there.

MR. HAHESY: Well, again, this is a case --

THE COURT: In other words, it sounds like he was laid off because there was no work for him.

MR. HAHESY: And that's the situation here where there was a slowdown in the business. People were laid off because of the slowdown of the business. And so, you know, when you have a case that involves claims relating to lay off, if you've got one of your jurors whose parent has undergone this event recently.

THE COURT: All right. I'm going to find that the facts are sufficiently analogous, in other words, a layoff because of a reduction in work and persons being out of work where the juror lives with his father. And that exact circumstance is being experienced.

There's certainly nothing racially charged or racially motivated against that and that's what Batson seeks to prevent. it doesn't seek to prevent the legitimate exercise of peremptory challenge for strategic reasons by a trial lawyer. Therefore I'm going to deny the Batson challenge on that.

Now, I recognize that there are , besides those three, only three other Hispanic jurors that are on the panel.

You're now exercising a Batson challenge for challenging Caucasians. However, those three would be people that they would not challenge logically for the reasons that you've challenged them. So there's no issue there. And what's the basis to say that there is any racially improper motive where we've got 15 out of the 21 jurors who are Caucasians?

MR. HAHESY: Well, I mean, I -- it's -- there's four jurors that they've kicked. All of them are women. Three of them are older white women who are managers.

THE COURT: They're managers.

MR. HAHESY: Own businesses.

THE COURT: In other words, just like I allowed you your strategic reasons. It's labor versus management. and you want to get rid of managers, quite frankly, if you're the claimant.

MR. HAHESY: If that's their justification for --

THE COURT: Well, we haven't heard the justification, but I'm assuming --

MR. SMITH: It was strategic, Your Honor, and that is in part some of the reasons that --

THE COURT: I am. I mean, I can't prevent you from making your Batson challenge if you're serious about it.

MR. HAHESY: I'm fine with the jury.

THE COURT: Let's do that. Let's finish the jury selection. I think that's a wise choice.

* * *

I, KAREN L. LOPEZ, Official Reporter, do hereby certify that the foregoing transcript as true and correct.

Dated: 03/10/2009

/s/ Karen L. Lopez

KAREN L. LOPEZ, RMR-CRR

Appendix D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, et al.,	)	
Plaintiffs,	)	1:99-cv-6443 OWW SMS
vs.	)	SPECIAL VERDICTS
NIBCO, INC., an Indiana corporation,	)	OF TRIAL JURY
Defendant.	)	
	)	

We the jury in the above-entitled cause find the following answers to the questions submitted to us.

Question 1: On Plaintiffs' Title VII claim, do you find by a preponderance of the evidence that Nibco's Z test had a disproportionate adverse effect in causing the lay off of Hispanic and Asian employees?

PLAINTIFF	YES	NO
Alicia Alvarez	___	X
Eva Arriola	___	X
Peuang Bounnhong	___	X
Chhom Chan	___	X
Mao Her	___	X
Bee Lee	___	X
Paula Martinez	___	X
Maria Medina	___	X
Mai Meemoua	___	X
Margarita Mendoza	___	X
Bao Nhia Moua	___	X

Isidra Murillo	___	X
Maria Navarro	___	X
Vath Rattanatay	___	X
Martha Rivera	___	X
Ofelia Rivera	___	X
Sara Rivera	___	X
Maria Rodriguez	___	X
Maria Ruiz	___	X
Maria Valdivia	___	X
Sy Vang	___	X
Youa Xiong	___	X
See Yang	___	X

If you answered "yes" as to any plaintiff, answer Question 2. If you answered "no" as to all plaintiffs, answer Question 5.

Question 2: Has Nibco proved by a preponderance of the evidence that the Z tests were job related to and consistent with business necessity?

Yes __ No___

If you answered Question 2 "yes," answer Question 3. If you answered Question 2 "no," answer Question 5.

Question 3: Have Plaintiffs proved by a preponderance of the evidence that:

(a) a less discriminatory alternative selection method as defined in Jury Instruction No. 21, was available?

Yes __ No___

(b) Nibco refused to adopt the alternative selection method?

Yes __ No___

If you answered yes as to any of the Questions in Question 3, answer Question 4. If you answered no to any of the subsections to Question 3, answer Question 5.

Question 4: Was any disproportionate adverse effect of the administration of the Z test by Nibco a cause of the lay off of any plaintiff?

PLAINTIFF	YES	NO
Alicia Alvarez	___	___
Eva Arriola	___	___
Peuang Bounnhong	___	___
Chhom Chan	___	___
Mao Her	___	___
Bee Lee	___	___
Paula Martinez	___	___
Maria Medina	___	___
Mai Meemoua	___	___
Margarita Mendoza	___	___
Bao Nhia Moua	___	___
Isidra Murillo	___	___
Maria Navarro	___	___
Vath Rattanatay	___	___
Martha Rivera	___	___
Ofelia Rivera	___	___
Sara Rivera	___	___
Maria Rodriguez	___	___
Maria Ruiz	___	___
Maria Valdivia	___	___
Sy Vang	___	___
Youa Xiong	___	___

See Yang	___	___

Answer Question 5.

Question 5: As to plaintiffs' FEHA claims, did Nibco's administration of its Z test cause disproportionate adverse effect in causing the lay off of any plaintiff by reason of any plaintiffs' national origin?

PLAINTIFF	YES	NO
Alicia Alvarez	___	X
Eva Arriola	___	X
Peuang Bounnhong	___	X
Chhom Chan	___	X
Mao Her	___	X
Bee Lee	___	X
Paula Martinez	___	X
Maria Medina	___	X
Mai Meemoua	___	X
Margarita Mendoza	___	X
Bao Nhia Moua	___	X
Isidra Murillo	___	X
Maria Navarro	___	X
Vath Rattanatay	___	X
Martha Rivera	___	X
Ofelia Rivera	___	X
Sara Rivera	___	X
Maria Rodriguez	___	X
Maria Ruiz	___	X
Maria Valdivia	___	X
Sy Vang	___	X
Youa Xiong	___	X
See Yang	___	X

If you answered Question 6 "yes," as to any employee, answer Question 7. If you answered Question 7 "no" as to all plaintiffs, sign and return this verdict.

Question 6: Has Nibco established by a preponderance of the evidence that the Z test was job related and necessary to its business?

Yes __X__ No___

If you answered "yes," answer Question 7. If you answered "no," and answered Question 5 "yes," answer Question 8.

Question 7: If you found that Nibco's Z test was job related and necessary to its business, have plaintiffs proved that:

(a) There was an alternative employment practice that would have accomplished the business purpose equally well?

Yes __ No__X__

(b) Would this alternative employment practice have had less adverse impact on Hispanic and Asian employees?

Yes __ No__X__

If you answered Question 7 yes, answer Question 8. If you answered Question 7 no, sign and return this verdict.

Question 8: Was Nibco's Z test a substantial factor in causing the lay off of any Plaintiff?

PLAINTIFF	YES	NO
Alicia Alvarez	___	___
Eva Arriola	___	___
Peuang Bounnhong	___	___
Chhom Chan	___	___
Mao Her	___	___
Bee Lee	___	___
Paula Martinez	___	___
Maria Medina	___	___
Mai Meemoua	___	___
Margarita Mendoza	___	___
Bao Nhia Moua	___	___
Isidra Murillo	___	___
Maria Navarro	___	___
Vath Rattanatay	___	___
Martha Rivera	___	___
Ofelia Rivera	___	___
Sara Rivera	___	___
Maria Rodriguez	___	___
Maria Ruiz	___	___
Maria Valdivia	___	___
Sy Vang	___	___
Youa Xiong	___	___
See Yang	___	___

Sign, date and return this verdict.

We the jury in the above-entitled case have unanimously found the foregoing answers to the questions submitted to us in this verdict form. So say we all.

DATED: November 26, 2008. /s/ Albert Veldstra

Foreperson

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, et al.,	)	
Plaintiff,	)	JUDGMENT IN A
vs.	)	CIVIL ACTION
NIBCO, INC.,	)	1:99-CV-06443
Defendant.	)	OWW/SMS
_____	)	

JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdicts.

IT IS HEREBY ORDERED AND ADJUDGED that the unanimous verdicts of trial jury were returned in open court November 26, 2008, finding in favor of defendant Nibco, Inc and against each plaintiff on all of plaintiff's claims.

Judgment is entered in favor of defendant Nibco, Inc. and against each plaintiff: Martha Rivera, Mao Her, Alicia Alvarez, Eva Arriola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Domitilia Medina, Mai Meemoua, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, See Yang. Plaintiffs shall take nothing by their complaint. Defendant shall recover its costs of suit.

VICTORIA C. MINOR, Clerk
/S/ Alice Timken
DATED: December 1, 2008 By: Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-15136

MARTHA RIVERA, et al.,

Plaintiffs-Appellants,

v.

NIBCO, INC., an Indiana corporation,

Defendant-Appellee.

Filed May 20, 2010

ORDER

Before: REINHARDT and HAWKINS, *Circuit Judges*, and SILER, *Senior Circuit Judge.*[*]

Judges Reinhardt and Hawkins have voted to deny the petition for panel rehearing. Judge Siler has voted to grant the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judges Hawkins and Siler so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has

[*] The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

175 (2)

Supreme Court, U.S.
FILED
NOV 22 2010
OFFICE OF THE CLERK

No. 10-383

In the

Supreme Court of the United States

NIBCO, INC.,

PETITIONER,

v.

MARTHA RIVERA, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals may engage in comparative juror analysis in the first instance to determine whether impermissible discrimination motivated a peremptory challenge in a civil case in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), where all of the evidence examined was before the district court.

2. Whether it is an abuse of discretion for a court of appeals to remand a case for a new trial where it has considered all relevant facts, and has concluded that the district court clearly erred by overruling a *Batson* objection.

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STATEMENT OF THE CASE

This is an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*, and filed in the U.S. District Court for the Eastern District of California on October 1, 1999. Respondents Martha Rivera, *et al.*, are 23 Latina and Southeast Asian former employees of Petitioner NIBCO, Inc. ("Nibco") whose proficiency in English is limited. They worked at Nibco's facility in Fresno, California, which manufactured and assembled parts for drip irrigation systems. Their complaint alleges that Nibco terminated them from jobs they had performed well for years (in some cases, over fifteen years), based solely on their failure to pass a non-job-related written examination that was only administered in English.

That thirteen-page examination, which required a 100% score on a battery of true/false, multiple choice, and other questions requiring written answers, Ninth Circuit Excerpts of Record ("EOR") 285, necessitated a level and type of English proficiency greatly exceeding what respondents actually needed to do their jobs, which were routinized, unskilled, and non-language-dependent in nature. After first telling its employees that they could just sign their names on the examination, Nibco later informed them that their performance on the test would, in fact, determine which workers would be the first to lose their jobs in the event of a layoff. EOR 292. The only workers to fail the

examination were foreign-born workers of Latin American and Asian national origins. EOR 293. Ultimately, they were indeed fired before all other Nibco employees, in waves of terminations beginning in July 1998. *Id.* By contrast, all of Nibco's Caucasian employees passed the examination, EOR 286, and were only laid off months later. Respondents allege that Nibco's imposition of this examination, and their consequent terminations, adversely impacted them because of their national origins and were unsupported by business necessity.

Trial commenced on October 8, 2008, and jury selection took place the same day. After the venire had been narrowed to fifteen Caucasian and six Latino members, counsel for Nibco exercised three of his four peremptory strikes to remove Latino prospective jurors "TG," "RG," and "L." Counsel for respondents sought a sidebar conference, arguing that Nibco's counsel's stated reasons for striking those prospective jurors had no factual support in the record, and that the strikes were discriminatory under *Batson v. Kentucky*, 476 U.S. 79 (1986).[1]

---

[1] Petitioner Nibco has styled one of the appendices to its Petition, Appendix B, as "Jury Selection Proceedings before the United States District Court for the Eastern District of California, dated October 8, 2008." Pet. iv. Appendix B, however, does not contain the complete transcript of the jury selection proceedings. Notably, it omits the first 207 pages of that transcript, including the entire initial voir dire conducted by the district court. EOR 1-207. The omitted portion, which includes much of the factual basis for the panel's comparative juror analysis, is reproduced as Appendix A ("Resp. App.") to this brief.

A comparison of Petitioner's Appendix B with the corresponding portions of the voir dire transcript also reveals

At sidebar, Nibco's counsel asserted that he struck Latina prospective juror TG because her sister had been fired due to discrimination,[2] and because she had worked in a multilingual workplace where she "loved working with all of the people of the different languages." Pet. App. 50. Neither of those reasons, however, was supported by the record. Pet. App. 4. Indeed, in response to Nibco's counsel's questioning on voir dire, TG had stated that her sister had been fired simply because she had "called off too many times." Pet. App. 47. Nibco's counsel also stated that he struck TG because she had once filed a workers' compensation claim. Pet. App. 50. However, although he had questioned TG about that claim, Pet. App. 47-48, he did not question, let alone challenge, five Caucasian prospective jurors over their workers' compensation claims. Pet. App. 10-23, 46-49; Ninth Circuit Appellants' Appendix ("AA") 138, 160, 171, 215, 248. He additionally queried TG about her prior jury service, Pet. App. 48, and justified his strike of TG on the ground that she had served on a hung jury, Pet. App. 50. But he did not question any of the seven Caucasian prospective jurors who had prior jury service about that subject, Pet. App. 10-23, 46-49; AA 99, 110, 121, 154, 187, 198, 209, even one who admitted on her questionnaire that she found it "[h]ard judging

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that at least eight paragraphs of those portions of the transcript, *see* EOR 211:16-18, 235:12-18, 238 16-18, do not appear in Appendix B.

[2] Nibco's counsel followed that statement with "[o]r not," but said nothing when the district court later gave TG's sister's involvement in a discrimination suit as a reason for upholding her strike. Pet. App. 55.

others," Pet. App. 5; AA 154, and another who wrote on her questionnaire that "[i]t is a waste of time." AA 99.

Nibco's counsel justified his strike of Latina prospective juror RG by stating that her mother had brought a discrimination lawsuit. Pet. App. 49. He did so despite RG's statement to the contrary, in response to his own voir dire questioning, that her mother had *not* filed any such case, and instead had "just moved on." Pet. App. 19. Nibco's counsel also asserted that RG had not been sufficiently forthcoming on her juror questionnaire concerning any prior experiences with workplace mistreatment. Pet. App. 50. This, too, was at odds with the record; RG had clearly indicated on her questionnaire that she or those close to her had experienced discipline, discrimination, and/or harassment on the job. AA 45, 49.

Lastly, Nibco's counsel said he struck Latino prospective juror L because L's father, with whom he stated L lived, had been "recently" laid off, and because L had "indicated that, you know, the experience of his father getting laid off was something that bothered him and he was concerned about that." Pet. App. 51. However, L had in fact said nothing during voir dire about any feelings he may have had about his father's layoff. Nor was there anything in the record indicating that L lived with his father. Resp. App. A-146-48; AA 139-49; EOR 154:20-155:25.

The district judge nonetheless upheld each of Nibco's peremptory strikes, expressly accepting as

true many of Nibco's counsel's assertions of fact (and ultimately disputing none) despite their lack of any support in the record. Pet. App. 53-55. 59. Among other things, the district judge stated his understanding that peremptory strikes were permissible where the proffered justification "is not irrational," Pet. App. 54, and "as long as you have a facially valid reason that has some basis in logic and strategy". Pet. App. 56.

The jury that was finally seated consisted of ten Caucasians and two Latinos. After a 27-day trial,[3] the jury returned a verdict in Nibco's favor.

Respondents appealed to the Ninth Circuit, contending the district judge clearly erred in allowing Nibco's strikes of the Latino prospective jurors. Respondents advanced two primary arguments: (1) that Nibco had made multiple misrepresentations of fact in justifying those strikes -- misrepresentations that the district court accepted as true; and (2) that comparative juror analysis revealed a disparate pattern in Nibco's counsel's questioning and treatment of prospective jurors that could be reasonably explained only by reference to the person's race. Given those indicia of improper conduct, respondents argued, the district court clearly erred in not finding that Nibco's counsel's stated reasons for its strikes were pretextual.

In a memorandum disposition, the Ninth Circuit examined the record of the jury selection.

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[3] Petitioner, inexplicably, refers to the trial as being 52 days long. Pet. 7, 14, 16, 29, 31, 34.

Pet. App. 4-7. It concluded that the record "reveal[ed] major flaws in all three of the reasons accepted by the court" in connection with prospective juror TG, Pet. App. 4, and accordingly found that Nibco's strike of TG violated *Batson*. Pet. App. 6. The panel relied primarily upon several instances where Nibco had mischaracterized, or proffered conclusions unsupported by, TG's actual statements. Pet. App. 4-5. It also noted two instances where Nibco's counsel had not questioned similarly situated Caucasian jurors as he had questioned TG. Pet. App. 6-7.

Although the panel did not make findings with respect to the strikes of prospective jurors RG and L, it nonetheless examined the record and observed that, as with TG, Nibco's counsel had made factual representations about RG and L that had no support in or even conflicted with the record. *Id.* The panel did not apply comparative juror analysis in their cases. Instead, the panel found that the unsupported nature of Nibco's counsel's factual assertions concerning RG and L further provided evidence of intentional discrimination with respect to its strike of TG. Pet. App. 7.

Sixth Circuit Judge Eugene E. Siler, sitting by designation, dissented from the memorandum disposition. Noting his agreement that the district court was bound "to consider each explanation within the context of the record, regardless of whether relevant portions of the record are brought to its attention by the movant," Judge Siler disagreed that the district court had committed clear error. Acknowledging that comparative juror analysis could

indicate otherwise, Judge Siler found that Nibco's counsel's disputed factual representations could have race-neutral explanations, and thus would have affirmed the district court. Pet. App. 8-9. Judge Siler, however, did not object to the panel majority's application of comparative juror analysis for the first time on review.

Nibco's motion for panel rehearing was denied, and the entire panel recommended against rehearing en banc. No judge of the Ninth Circuit voted to rehear the case en banc. Pet. App. 67-68. Nibco then sought certiorari.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between The Circuits As To When Comparative Juror Analysis May Be Conducted For The First Time On Appeal In A Civil Case.

Petitioner attempts to conjure a "messy, deep, and well-established" difference of opinion among the courts of appeal with respect to when comparative analysis may be forfeited in situations such as the one here. Pet. 22. But a review of the cases reveals that the circuits have rarely confronted the relevant question squarely. The petition should be denied to allow those courts additional time to apply *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El*"), and address in the first instance when, if ever, a court of appeals reviewing the disposition of a civil action may not engage in comparative juror analysis for the first time on appeal.

As a threshold matter, it is exceedingly important to note that because the instant case arises from the civil setting, any decision on the merits by this Court will not provide guidance to the courts in the great bulk of cases in which they consider *Batson* challenges: habeas appeals from state criminal convictions under 28 U.S.C. § 2254. Since the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), section 2254 allows the grant of a habeas petition only where the decision on the merits below resulted in either a "an unreasonable application[] of clearly established Federal law" or "an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C.A. § 2254(d)(1)-(2) (West 2010). That demanding standard, as the Court is well aware, is entirely inapplicable in civil actions. The resolution of the case at bar would only speak to whether a court of appeals, using comparative analysis for the first time, may reverse a federal district court that failed to do so. But it would not address the very different and much more frequently occurring issue of whether, and under what circumstances, it might be "unreasonable" within the meaning of AEDPA for a state trial court to fail to apply such an analysis in the habeas setting. It is the latter question that has preoccupied the courts – not the relatively infrequent situations in which comparative analysis has become a disputed issue in the civil context.[4]

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[4] Respondent's review of the more than 1,100 federal and state cases that cite to *Miller-El* indicates that fewer than 2% of those cases arose from the civil context.

But even assuming that a civil case such as that at bar could be used to shed light, however inferentially, on whether and when a court of appeals may conduct a comparative juror analysis for the first time in the criminal context, the petition nonetheless should be denied because no substantial disharmony exists between the courts of appeals on the latter question. Contrary to Petitioner's representations, Pet. 18, an examination of the law in the Circuits reveals that very few courts of appeal have squarely considered the issue of whether comparative analysis is mandatory either by a trial court or on appeal. As such, there is no well-developed conflict on that question for the Court to address. Petitioner's suggestion to the contrary rests upon a misunderstanding of the decisions to which it cites.

To begin with, Petitioner characterizes the Ninth Circuit as staking out a clear position that comparative juror analysis is "mandatory" in all situations,[5] Pet. 18, a position it argues would render objections based on such analysis non-waivable. But this characterization is inaccurate. Notwithstanding *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006), which stated that side-by-side juror comparisons are necessary, *id.* at 361, other Ninth Circuit opinions take divergent positions. A month after *Kesser* was handed down, for example, another Ninth Circuit panel stated that it was "not hold[ing] that

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[5] Petitioner's first Question Presented wrongly frames the issue before the Court. The relevant inquiry, instead, is whether a court of appeals *may* conduct comparative juror analysis for the first time on appeal.

comparative juror analysis is *always* compelled at the appellate level." *Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006). Further, just weeks ago, another panel affirmed a state court's rejection of a *Batson* challenge despite that court's failure to engage in comparative juror analysis. *Watkins v. Small*, No. 08-56363, 2010 WL 4117075, *1 (Oct. 20, 2010) (denying habeas petition because "Watkins fails to show that comparative analysis would have demonstrated that the prosecutor's race-neutral justifications . . . were pretextual."). While there is consensus within the Ninth Circuit that comparative juror analysis is at least "an important tool that courts *should* . . . use[] on appeal," *Boyd*, 467 F. 3d at 1148, its habeas decisions at most suggest a rule that courts of appeal must engage in comparative juror analysis for the first time on appeal, provided, however, that the analysis would have helped to ferret out prohibited discrimination. *Compare Watkins*, 2010 WL 4117075, *1, *with Kesser*, 465 F.3d at 361. Other than this, because the Ninth Circuit has not been squarely addressed the issue, there is no clear rule concerning "forfeiture."

Contrary to Petitioner's claims, *see* Pet. 20, the Sixth Circuit has similarly reached no clear position on the "forfeiture" question. The single habeas case cited by Petitioner lends no support for its contention that comparative arguments can be forfeited. Rather, in *Braxton v. Gansheimer*, 561 F.3d 453 (6th Cir. 2006), reviewing *de novo* a federal district court's grant of a habeas petition, the panel concluded that the district court had failed to afford sufficient deference under AEDPA to the trial state court. *Id.* at 462. The panel found the state trial

court's determinations to be reasonable in light of the record before it, where defense counsel had failed to raise comparative juror arguments. *Id.* at 464-65. This, however, is a far cry from any holding that courts of appeal are barred from engaging in side-by-side comparisons when they are not raised below. [6]

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[6] Moreover, the Sixth Circuit interprets *Miller-El* to allow for comparative juror analysis for the first time in the direct appeal context. *See United States v. Cecil*, No. 08-5080, 2010 WL 3120027, *5 (6th Cir. 2010) (engaging in comparative juror analysis for the first time and finding that comparing jurors would not have been probative where there was no evidence in the record which demonstrated that white jurors were similarly-situated to the struck black juror); *United States v. Katuramu*, 174 F. App'x 272, 275-276 (6th Cir. 2006) (considering comparative juror arguments raised for the first time on appeal and concluding that the district court had not erred given the state of the record before it). Thus, while failure to undertake comparative juror analysis "is not necessarily reversible error," *Cecil*, 2010 WL 3120027, *5, the Sixth Circuit, like the Ninth Circuit, appears to have concluded that appellate courts must engage in comparative juror analysis where doing so would prove or disprove discrimination. *United States v. Odeneal*, 517 F.3d 406, 419-20 (6th Cir. 2008) (concluding that *Miller-El* establishes that district courts should employ comparative juror analysis); *United States v. Torres-Ramos*, 536 F.3d 542, 560 (6th Cir. 2008) (finding that *Miller-El* "places an affirmative duty on the district court to examine all relevant evidence that is easily available . . . includ[ing] examining the juror questionnaires"). As such, there can be no suggestion of conflict between those courts of appeal. In any case, however, none of the cases Petitioner cites has had any occasion to decide whether *Miller-El* precludes the "forfeiture" of comparative juror analysis, or if there are any circumstances in which a court of appeals should not engage in comparative juror analysis in the first instance.

Petitioner similarly mischaracterizes the Seventh Circuit's *Batson* jurisprudence since *Miller-El*. By concluding that *Lamon v. Boatwright*, 467 F.3d 1097 (7th Cir. 2006) "limit[s] *Miller-El* [] to its facts", Pet. 21, Petitioner would read into *Lamon* a non-existent holding that comparative juror analysis is not available for the first time on appeal, arguing that the court did not find reversible error where the trial court "made no attempt at side-by-side comparisons." *See id.* But *Lamon*, a habeas case, in no way stands for that proposition.[7] The petitioner

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[7] Other Seventh Circuit decisions applying *Miller-El* have certainly not shown any inclination to interpret its application of comparative analysis to reverse the trial court therein as limited to *Miller-El*'s facts. For example, although one panel's great deference to state courts due to AEDPA tipped the balance in the prosecution's favor, the panel strongly suggested that it would have employed comparative juror analysis to reach a different result. *See Bennett v. Gaetz*, 592 F.3d 786, 792 (7th Cir. 2010) (affirming denial of habeas petition, but noting that had the state courts proceeded to the second and third prongs of the *Batson* analysis, comparative juror analysis might have disproved race-neutral reasons for the strikes). In another habeas case, the Seventh Circuit declined to employ a comparative analysis not because it concluded *Miller-El* did not require it, but, rather, because the jurors sought to be compared were not similarly situated. *See Mahaffey v. Ramos*, 588 F.3d 1142, 1147 (7th Cir. 2009). The Seventh Circuit, in the context of direct appeals, has recognized that comparative juror analysis pursuant to *Miller-El* is probative when evaluating a Batson challenge. *See United States v. White*, 582 F.3d 787, 802 (7th Cir. 2009) (comparing jurors side-by-side to assess prosecutor's race-neutral reasons); *United States v. Stephens*, 514 F.3d 703, 711 (7th Cir. 2008) ("Credibility may also be evaluated by considering the offering party's consistency in applying its non-discriminatory justification."). Importantly, though, in none of these cases has the Seventh Circuit considered the issue of forfeiture.

in the case had argued that the trial court failed to comply with *Miller-El* because it had not sufficiently inquired of a prospective juror, thereby denying her a sufficiently thorough *Batson* hearing. 467 F.3d at 1100-01. She asserted that the juror's answers to particular questions could have proven that the prosecutor's stated reasons for striking the juror were incorrect. *Id.* at 1101. But reasoning that *Miller-El* tasks a court to assess the credibility of the strike proponent, rather than the correctness of the reasons proffered for the strike, *Lamon* concluded that the answers the petitioner sought would have shed no light on the prosecutor's credibility and, therefore, that comparative juror analysis was *unnecessary*. *Lamon*, thus, was in no way directed to "forfeiture" issues. Consequently, like other circuits, the Seventh Circuit employs comparative juror analysis when it sheds light on the presence or absence of discrimination, *see United States v. White*, 582 F.3d 787, 802 (7th Cir. 2009); *United States v. Stephens*, 514 F.3d 703, 715-20 (7th Cir. 2008); *Lamon*, 467 F.3d at 1101, but it has not had occasion to determine whether *Miller-El* precludes the "forfeiture" of comparative juror analysis on habeas.

Petitioner also distorts the Fifth Circuit's post-*Miller-El* jurisprudence, characterizing it as having arrived at a clear standard requiring comparative juror analysis in the first instance on appeal only in capital cases, and permitting "forfeiture" or "waiver" of comparative analysis in all others. *See* Pet. 20-21. But while *Woodward v. Epps*, 580 F.3d 318 (5th Cir.

2009), was a capital case, the panel did not rely on that fact in deciding to entertain petitioner's comparative arguments for the first time on appeal. Instead, without noting *Miller-El* was also a capital case, the panel simply acknowledged that *Miller-El* had explicitly rejected arguments that appellate courts should not entertain comparative juror arguments raised for the first time on appeal, and proceeded to engage in side-by-side comparisons. *Id.* at 338. Further, as recognized by *Woodward*, it is not at all clear that the other Fifth Circuit cases Petitioner cites for this proposition are good law. *See id.* For example, though *Wright* was decided after *Miller-El*, that panel does not so much as acknowledge *Miller-El*, much less interpret it.[8] *See Wright v. Harris County*, 536 F.3d 436 (5th Cir. 2008). Instead, it relies exclusively on pre-*Miller-El* authority for its assertion that a civil plaintiff can waive her *Batson* challenge by failing to rebut reasons proffered for striking a juror. *Id.* at 438 (citing *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) and *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990)).

Moreover, a broader review of the Fifth Circuit's jurisprudence contradicts Petitioner's assertion, *see* Pet. 20-21, that it has sufficiently

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[8] *Wright* is otherwise distinguishable from the case at bar. In *Wright*, the defendant did not dispute the reason for the strike that was offered by the prosecution. 536 F.3d at 438. Here, after Nibco's counsel offered a racially neutral reason, Respondents' counsel argued that those reasons were pretextual.

considered the issue of "forfeiture." *See, e.g., Reed v. Quarterman*, 555 F.3d 364, 369-370 (5th Cir. 2009) (resolving, on habeas review, to employ comparative juror analysis where those arguments had not been raised to the state courts, because state courts had not consistently applied a procedural bar). And, even if looking to cases not governed by AEDPA, the Fifth Circuit's decisions in fact are in harmony with the case at bar. *See, e.g., United States v. Williams*, 610 F. 3d 271, 283 n.13 (5th Cir. 2010) (holding *Miller-El* does not prohibit comparisons on appeal not previously explored); *United States v. Brown*, 553 F.3d 768, 796-97 (5th Cir. 2008) (engaging in comparative juror analysis for the first time on appeal).

Only a few other post-*Miller-El* courts of appeal have considered the issues of "forfeiture" or "waiver." But, even in the direct appeal context, they have inexplicably failed to consider *Miller-El*. *See United States v. Walley*, 567 F.3d 354, 358 (8th Cir. 2009) (relying on pre-*Miller-El* cases to conclude that it would not consider comparative juror arguments); *United States v. Chapman*, 209 F. App'x 253, 263-64 (4th Cir. 2006) (concluding, based on pre-*Miller-El* cases, that arguments related to juror differences had been waived or forfeited because they had not been raised in the district court); *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006) (citing *Smith v. Horner,* 839 F.2d 1530, 1534-35 (11th Cir. 1988)).[9] Plainly, these Circuits would benefit from

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[9] The other cases cited by Petitioner regarding the Eleventh Circuit's jurisprudence (Pet. 21-22) shed no light on whether the Eleventh Circuit opines that comparative

additional time to consider and formulate positions on such issues in light of this Court's decisions.

In sum, the Court should deny the petition because there is no well-developed split in circuit authority as to whether comparative analysis may be conducted in the first instance on review of a habeas claim – a question upon which resolution of the instant case would, in any event, provide only oblique guidance.

II. Certiorari Would Also Be Inappropriate Because The Matter Below Was Correctly Decided, And Judicial Economy Would Not Be Served

Petitioner additionally suggests that the panel opinion fundamentally misunderstands the Court's decisions in *Miller-El* and *Snyder* v. *Louisiana*, 552 U.S. 472 (2008) ("*Snyder*"), and "runs counter to well-

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arguments can be forfeited in habeas cases in light of *Miller-El*. In both *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), and *Atwater v. Crosby*, 451 F.3d 799 (11th Cir. 2006), the Eleventh Circuit reviewed state court decisions and did not engage in comparative juror analysis, citing to the highly limited and deferential review required by 28 U.S.C. § 2254. *Hightower*, 459 F.3d at 1071-72 (declining to consider comparative juror analysis arguments because they were not raised to the state courts and because petitioner had failed to adequately plead that failure to raise those arguments constituted ineffective assistance of counsel); *Atwater*, 451 F.3d at 807 (deferring to state courts' reasonable application of *Batson*, and declining to consider comparative juror arguments). *Atwater* is further distinguishable from the case at bar because there was no evidence in the record regarding the jurors which the Eleventh Circuit could have analyzed. 451 F.3d at 807.

established principles of fact-finding, forfeiture, and appellate procedure." Pet. 22. These extravagant claims are simply unsupported. Moreover, even assuming *arguendo* Petitioner's concerns were to be credited, certiorari would be judicially inefficient in that the decision below is supported by independent grounds not raised here, and further because Petitioner cannot demonstrate that the resolution of those concerns would inure to the benefit of more than a *de minimis* number of cases in the lower courts.

A. The Panel Properly Read and Applied *Miller-El* and *Snyder*.

The panel below simply did as this Court did in *Miller-El*: it conducted a comparative analysis for the first time on review and, in so doing, looked to unexamined evidence that was available to the trial court during the jury selection process. Indeed, the command that a reviewing court must consider all evidence bearing upon pretext is plainly set forth in *Miller-El*, which held that comparing relevant jurors was a "powerful" means of overcoming the "practical difficulty of ferreting out discrimination," and then proceeded to conduct just such an analysis in the first instance on appeal. 545 U.S. at 238, 241. Petitioner's attempt to dismiss *Miller-El*'s extensive comparative analysis, which forms the backbone of its reasoning, as nothing more than "illustrative" dicta, Pet. at 24 – particularly where it occupied over

20 pages of the Court's opinion, *id.* at 241-63 – is thus far-fetched.[10]

Indeed, the dissent in *Miller-El* criticized the majority for the very same reasons that Petitioner criticizes the panel decision here. It contended that "arguments about" specific juror comparisons "were not properly before" the Court because they were not "put before the Texas courts." 545 U.S. at 241 n.2 (citing 545 U.S. at 279 (Thomas, J., dissenting)). But the majority specifically rejected this reasoning, explaining that "the dissent conflates the difference between *evidence* that must be presented to the state courts to be considered by federal courts in habeas proceedings and *theories about that evidence*." *Id.* (emphasis added). The Court held that once the evidence was properly in the record, the defendant was free to make comparative arguments about that evidence to support his *Batson* challenge on appeal even if he did not specifically advance these theories about that evidence below. *Id.* Petitioner goes further to contend that *Miller-El* must be read as rejecting the panel's consideration of the prospective jurors' questionnaires themselves. But as Petitioner itself notes, *Miller-El* expressly *declined* "to reach

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[10] Petitioner faults the panel for citing to *Kesser* for its statement that *Miller-El* requires comparative juror analysis to be conducted on appeal, even where it was neither sought nor utilized below. Pet. 23 (citing *Kesser*, 465 F.3d at 361). Yet, as noted above, the salient inquiry here is not whether the Ninth Circuit was "required" to conduct a comparative juror analysis, but rather whether it was permitted to do so here. Nothing in this case calls upon the Court to establish a categorical rule that such an analysis is mandatory in all factual situations.

any question about waiver under [28 U.S.C.] §2254(d)(2)", *id.* at 257 n.15, rejecting the dissent's view that such consideration was improper. *Id.* at 241 n.2.

Petitioner's creative – if opaque – argument as to how *Miller-El* could not possibly have endorsed the first-time use of comparative analysis on appeal (despite having done so itself), because the Court would have exceeded its own limits of habeas review by doing so, is wholly without merit.[11] It rests on the unfounded assumption that utilizing comparative juror analysis for the first time on review is somehow questionable under "clearly established Federal law." But the far simpler explanation is that the Court believed it was acting consistently with clearly established law when it undertook a comparative analysis for the first time on appeal. Petitioner's assertion that courts have cited "widely" to *Miller-El*'s "augmented record" as "confirmation" that comparative juror analysis cannot be conducted on appeal in other factual

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[11] Petitioner asserts that "[h]ad the [*Miller-El*] Court believed that it was establishing a *new* procedural rule, it could not have applied that rule to Miller-El. . . . Instead, *Miller El II* made clear that it was 'simply following clearly established law as AEDPA requires'; it was not 'alter[ing] *Batson* claims' or 'craft[ing] a new legal standard.'" Pet. 24. (citing *Golphin v. Branker*, 519 F.3d 168, 186 (4th Cir. 2008)). In *Golphin*, however, the Fourth Circuit simply observed that *Miller-El* did not change the established three-step process for analyzing *Batson* claims; the panel was not directed to alleged issues of "waiver" or "forfeiture." *Id.*

circumstances, Pet. 23, rests on just two citations, neither of which supports that proposition.[12]

Similarly, the claim that *Snyder*, also supports Petitioner's attack upon the panel's use of comparative analysis in the first instance is likewise wanting. *Snyder* clearly holds that "*all* of the circumstances that bear upon the issue of racial animosity *must* be consulted." 552 U.S. at 478 (emphasis added). Moreover, *Snyder*'s detailed

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[12] Judge Rymer's dissent in *Kesser* nowhere discusses forfeiture. Instead, she appeared most concerned by the absence of a "record for comparing challenged jurors to unchallenged jurors." 465 F.3d 351, 386 (9th Cir. 2006) (Rymer, J., dissenting). In the case at bar, of course, such a record exists. *See supra* pp. 2-3. In addition, *Hightower* rests its holding on a quirk of Georgia "state procedural law" that is inapplicable in this direct civil appeal. *See* 459 F.3d at 1070-71. There, the criminal defendant raised a *Batson* challenge (without specifically requesting comparative juror analysis) as part of his direct criminal appeal in state courts that he ultimately lost. *Id.* He then filed a habeas petition in state court raising the same *Batson* challenge on state collateral review. The state courts rejected that argument as a matter of Georgia state procedural law, under which "issues raised in a defendant's direct appeal of his conviction cannot be relitigated on collateral attack in a habeas corpus proceeding." *Id.* The petitioner then filed his federal habeas petition raising the same *Batson* challenge, and for the first time argued that the court should have conducted a comparative juror analysis. *Id.* It was this final habeas petition before the Eleventh Circuit in *Hightower*, and the court held that the state procedural law "precluded him from relitigating" his overall *Batson* challenge and barred him from making new arguments that he did not present in his direct appeal. *Id.* at 1071. Here, in contrast, no analogous state procedural law or related collateral review applies.

comparison of the prosecution's disparate treatment of African-American and Caucasian prospective jurors, *see* 552 U.S. at 479-81, 483-85, clearly demonstrates that such strong language is not mere "illustrative" dicta, as Petitioner would have it. *See* Pet. 24. Indeed, *Snyder* in fact relied in part upon evidence that was never mentioned in the trial court. *Id.* at 489 (Thomas, J., dissenting). Petitioner's effort to characterize *Snyder* as disfavoring comparative analysis "based on a cold appellate record," Pet. 24, is seriously undercut by *Snyder*'s own use of just such a record to reverse the Louisiana trial and supreme courts. *Snyder*'s admonition that appellate courts must be "mindful" of potential concerns regarding evidence not fully explored at trial, 552 U.S. at 483, to which Petitioner alludes, must therefore be understood in light of *Snyder*'s notable lack of hesitation to act upon the results of comparative analysis where its import was clear.

In sum, the panel correctly interpreted *Miller-El* and *Snyder*. Petitioner's claim to the contrary finds no support in either of those decisions.

B. Petitioner's Appeal To Deference Itself Is At Odds With This Court's Precedents.

Substantial deference is indisputably owed a district court's findings concerning pretext. But Respondents dispute Petitioner's apparent assumption – even in the face of plain evidence of

pretext indicative of clear error – that such deference is essentially unbounded.[13] Such a reading of *Batson* would effectively render it a dead letter; accordingly, even under the heightened standard applicable in the habeas context, the deference due the trial court is "demanding but not insatiable," *Miller-El*, 545 U.S. at 240; *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment of judicial review.").

The panel's analysis of the proceedings regarding Latino prospective juror TG, upon whose strike the panel based its reversal, demonstrates that its inferences of pretext were squarely supported by this Court's precedents, and not insufficiently deferential to the district court. *See* Pet. App. 4-5. The panel first noted that Nibco's counsel misrepresented TG's statements during voir dire, stating that TG had expressed fondness for a previous employer because its workforce was multilingual, and that her sister had experienced workplace discrimination. Pet. App. 4-5. Neither of those representations – adopted by the district court,

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[13] Petitioner's talismanic invocation of a trial judge's ability to judge credibility and demeanor as virtually trumping meaningful review finds no support in its own reliance upon *Thaler v. Haynes*, 130 S. Ct. 1171 (2010). There, the Court explicitly rejected the notion that only a trial court judge who "personally observed and recalls" relevant demeanor evidence can reach the merits of *Batson*'s third step. *Id.* at 1174-75. In so doing, *Thaler* repudiated the Fifth Circuit's statement that "no court, including ours, can now engage in a proper adjudication of the defendant's demeanor-based *Batson* challenge as to prospective juror Owens because we will be relying solely on a paper record . . . ." *Id.* at 1173.

Pet. App. 55, without comment by Nibco's counsel – was supported by the voir dire transcript. The panel's inference of pretext from misrepresentations such as these is entirely consistent with this Court's skepticism of proffered reasons for strikes that have no support. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("implausible and fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.").

The panel then observed that Nibco's counsel questioned TG about a prior workers' compensation claim, presumably to probe for evidence of anti-employer sentiment, but that he chose not to question several Caucasian prospective jurors who had also filed such claims. Similarly, it noted that although Nibco's counsel pointed to TG's prior service on a hung jury as a reason for striking her, he failed entirely to question several other Caucasian jurors with jury experience, including one who had trouble "judging others." In finding indicia or pretext in these instances, the panel again adhered to this Court's suspicion of proffered concerns as to which Caucasian prospective jurors were not questioned. *See Miller-El*, 545 U.S. at 246 ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination").

On all of those points, particularly given the stark nature of the facts pointing to discrimination, the panel acted well within this Court's precedents in finding Nibco's counsel's stated reasons for striking TG as pretext. In not deferring to the district court's

opposite conclusion, the panel did precisely what this Court did in *Miller-El* and *Snyder* – it rejected a trial court's finding of no pretext where the evidence to the contrary was plain and overwhelming.

C. Alternative And Independent Grounds Exist For The Decision Below.

Certiorari would additionally be inappropriate here inasmuch as the panel did not rest its decision on its application of comparative analysis alone. Instead, it focused equally if not more on factual misrepresentations made by Nibco's counsel about Latina prospective juror TG. *See* Pet. App. 4-5 ("First, Nibco's assertion that TG's sister had experienced discrimination . . . was completely unfounded and has no support in the record. Second, TG never said she loved working in a multilingual environment. Nibco conflated two unrelated statements in asserting otherwise. . . . And it is implausible that TG would have been biased by her sister's dismissal: the record shows that TG believed that it was her sister's own fault, because she missed too much work."). The panel likewise pointed to similar misrepresentations of fact concerning L[14] and

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[14] *See* Pet. App. 6 ("Nibco's only proffered reason for striking Juror L was that he lived with his father who had been recently laid off due to a lack of work. Nibco's counsel stated that Juror L 'indicated that . . . the experience of his father getting laid off was something that bothered him and he was concerned about that.' Counsel repeated three times that Juror L lived with his father and twice stressed that the lay-off was recent. . . . However, neither the court nor the parties asked him about the lay-off during voir dire (in fact, neither party asked him any questions at all), and there is no evidence in

RG[15] as further undermining Nibco's counsel's credibility with respect to his strike of TG. The panel found the district court's acceptance of these misstatements of fact, and its failure to perceive in them strong evidence of pretext, to constitute clear error. Pet. App. 4-7; *accord Purkett*, 514 U.S. at 768.

These indicia of racial purpose – objective misstatements of fact – are in no way dependent upon comparative analysis. The panel pointed to them as a separate and independent ground for discerning pretext in Nibco's strike of TG. Petitioner does not challenge the decision below on this basis. Because this separate ground exists for affirming the panel's decision, it would not be in the interests of judicial economy for the Court to grant the requested writ.

D. Even If Credited, Petitioner's Concerns Are Not "Important And Recurring" In Nature.

For the reasons discussed above, this case was correctly decided and lies well within this Court's precedents. Additionally, it is not a case where

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either the voir dire transcript or the juror questionnaires regarding how Juror L felt about it. Nor is there any evidence that the lay-off was recent, or that Juror L lived with his father. Nibco's lack of foundation for its assertions is troubling.").

[15] *See* Pet. App 7 n.4 ("Nibco's proffered reason for striking [RG] was similarly problematic. Nibco asserted that RG's mother had been involved in a discrimination suit against her former employer. However, the record reveals that RG's mother had experienced discrimination at work and then 'just moved on.'").

Petitioner can point to "a considerable number of suits [that] are pending in the lower courts which will turn on resolution of these issues." *Massachusetts Trustees of Eastern Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964). As already noted, *see supra* note 4 and accompanying text, the instant case is scarcely typical of most *Batson* litigation in that it arises from the civil context, in which the legal standards applying to criminal habeas as a result of AEDPA do not apply. As such, any contention that the precise issues that Petitioner discerns here will recur with comparative frequency would be implausible. Coupled with the absence of a genuine and fully developed circuit conflict on those issues, this is most certainly not a case where such issues "can be effectively resolved only by the prompt action of the Supreme Court alone." Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959).

III. The Panel Did Not Abuse its Discretion by Remanding for a New Trial.

After concluding that the district court had committed clear error by denying Respondents' *Batson* challenge, the panel did not abuse its discretion in ordering a new trial, instead of remanding for further consideration. Courts of appeals have wide authority to fashion appropriate remedies for a clear error committed by the district court. *See* 28 U.S.C.A. § 2106 (West 2010) ("any . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review,

and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had . . . .") This Court reviews for abuse of discretion the appropriateness of the appellate court's remedy. *Cf. Weisgram v. Marley Co.*, 528 U.S. 440, 456 (2000) (upholding under abuse-of-discretion review an appellate court decision to reverse a jury verdict and grant judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50, to the party that lost at trial rather than remanding for a new trial). "[D]eference . . . is the hallmark of abuse-of-discretion review." *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

Petitioner argues repeatedly that the district court should have been given the opportunity to "consider" "new arguments and evidence" that the trial court failed to address the first time. Pet. 31-33. Although Petitioner nowhere actually specifies what precisely is to occur on remand, its wording suggests that it seeks either to allow the district court to: (1) make additional factual findings regarding disputed or unknown underlying facts; and/or (2) simply re-weigh the underlying facts that it ignored in the first instance, and decide whether those facts demonstrate purposeful discrimination. The panel did not abuse its discretion when it determined that neither remedy was necessary here.

It is not reversible error for an appellate court to decline to remand for an evidentiary hearing where all of the relevant underlying facts are known and undisputed. *See, e.g., Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 118 (5th Cir. 2008) ("[A]

remand for specific findings is unnecessary 'if a complete understanding of the issues may be had without the aid of separate findings.'") (internal citation omitted); *accord United States v. Sawyer*, 441 F.3d 890, 894 n.1 (10th Cir. 2006); *Mobil Shipping and Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 69 (2d Cir. 1999); *United States v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989) (refusing to remand for an evidentiary hearing where "the facts are clear and undisputed.").

Here, a remand for further factual findings would have been pointless because all of the relevant facts are known and undisputed. There is no dispute about the racial composition of the prospective jurors, the contents of their juror questionnaires, or what they said during voir dire. There is likewise no dispute about Nibco's counsel's proffered reasons for striking the Latino prospective jurors. While Petitioner is correct that in some cases a factual finding by trial courts regarding counsel's demeanor may be probative, no such fact-finding was required here, where the *Batson* violation was apparent even in the absence of such evidence. Nor did the panel need to look to evidence regarding the demeanor of prospective jurors to conclude that Nibco's strike of TG was racially motivated, especially since Nibco's strike of TG was not based on her demeanor. Pet. App. 6. Thus, all of the underlying facts relevant to the *Batson* inquiry here were known and undisputed. The panel did not abuse its discretion by declining to

remand for an evidentiary hearing that was not necessary.

Likewise, the panel was not required to remand the case for the district court merely to re-weigh the undisputed underlying evidence that it ignored in the first instance. Appellate courts routinely refuse to remand matters to the trial court simply to consider the import of undisputed facts. *See, e.g.*, *Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 183 (3d Cir. 2010) (refusing to remand for "a re-weighing of the applicable factors" regarding the ultimate factual question of "likelihood of confusion" under the Lanham Act because to do so "would be a waste of judicial resources" "[w]here the facts are largely undisputed" and "application of the correct standard could support only one conclusion."). Indeed, in *Miller-El* itself, the Court considered juror questionnaires and juror information cards, even though it was "not clear to what extent the lodged material expand[ed] upon what the state judge knew." 545 U.S. at 257 n.15. In addition to examining evidence not weighed by the trial court, the Court considered arguments about the evidence on the record that, similarly, had not been presented to the state courts. *Id.* at 241 n.2. Yet the Court did not remand the matter to the state courts to weigh these new pieces of evidence and theories about that

evidence. *Id.* at 266. Instead, it weighed the relevant evidence itself, found an equal protection violation, and entered judgment for the petitioner.[16] Other appellate courts have likewise reached the ultimate issue of the *Batson* question themselves in the first instance, instead of remanding to the trial court for a re-weighing of undisputed facts.[17] And contrary to Petitioner's suggestion, not all of these cases involve habeas petitioners.[18] The panel certainly did not abuse its discretion when it took the same approach here, particularly where the relevant facts were not open to dispute.

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[16] This entry of judgment on the habeas petition was equivalent to granting a new trial. Indeed, on remand the Fifth Circuit set aside the petitioner's conviction and ordered him released unless he promptly received a new trial. *Miller-El v. Dretke*, 142 F. App'x 802 (5th Cir. 2005).

[17] *See Hayes v. Thaler*, 361 Fed.App'x 563, 575 (5th Cir. 2010) (considering a juror rating form and juror cards that were not available to the trial court, and then setting aside the conviction rather than remanding to the state court to re-weigh the new evidence); *Reed*, 555 F.3d at 374, 382 (conducting a comparative juror analysis for the first time on collateral review and setting aside a criminal conviction, rather than remanding to the state court to weigh the evidence in the first instance); *Stephens*, 514 F.3d at 713 (declining to remand for reconsideration of the *Batson* issue because it "would be a redundant exercise" to do so where "the record now in its entirety presents only one plausible conclusion").

[18] *See Stephens*, 514 F.3d at 713 (involving a direct appeal of a criminal conviction in federal court).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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November 22, 2010

APPENDIX

TABLE OF APPENDICES

Appendix A

Jury Selection Proceedings before the United States District Court for the Eastern District of California, dated October 8, 2008.....1a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. OLIVER W. WANGER, JUDGE

MARTHA RIVERA, et al.,	)	
	)	
Plaintiff,	)	No. 99-CV-6443-OWW
	)	
vs	)	JURY TRIAL - DAY 1
	)	JURY SELECTION
NIBCO, INC., an Indiana corporation,	)	
	)	
	)	
Defendant.	)	
	)	

Fresno, California Wednesday, October 8, 2008

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

KAREN LOPEZ, RMR-CRR
Official Court Reporter
CSR No. 5816

***

(The jury panel entered the courtroom.)

THE CLERK: The Court calls item number three. Case number 99-CV-6443. Martha Rivera, et al. versus Nibco, Inc. Jury trial.

THE COURT: Are the parties ready.

MR. SMITH: Yes, Your Honor. On behalf of the plaintiffs, we are ready.

MR. HAHESY: Yes, on behalf of Nibco.

THE COURT: Good morning, ladies and gentlemen. You have been called here this morning to help us select a jury in this case, a civil case. And what I'm going to do to alleviate the crowding is we're going to put 21 of you in the jury box right now before we even get started so you'll all have a little room. And so if you would, please, as your name is called, come forward, take seats in what we call the jury box, which is to your left on the north side of the courtroom. If you would, the first nine persons whose names are called, take the last seat closest to your end. You're on the west end of the courtroom. Fill the seats in the order that you're called in the top row. The next nine persons, please take seats in the second row in the order you're called. And then we'll ask that the last three persons whose names are call take three seats starting with the first seat in the row of chairs that's in front of the jury box.

So at this time I'm going to ask our courtroom deputy to call 21 names.

THE CLERK: Joel Garrett.

MR. SMITH: Your Honor, my list seems to -

THE COURT: No, your list -

MR. SMITH: I see. Number nine.

THE COURT: Your list is just as it should be.

THE CLERK: Gary Stanford. Albert Veldstra. Laura Scott. Sheri Spycher. Sandra Fox. Justin Brooks. Dave Stein. Jesus Galvan, Jr.

Jacqueline Geisler. Roxanne Garcia. Steven Mello. Lionel Dias. Adrian Lucatero. Jennifer Tweedy. Nancy Marchbanks. Lee Wilson. Stanley Braden.

David Nunez. Kenneth Holland. Patricia Stockton.

THE COURT: Now that we have 21 persons seated in the jury box, ladies and gentlemen, let me again thank you all for being here this morning. We know that this is an inconvenience to call you here for jury service. This takes you away from your daily activities, homes, your endeavors, your jobs. And we are asking you in this case to serve as citizen judges to resolve the issues that exist in this lawsuit. And in approaching the prospect of jury service, I would hope that all of you would recognize that something that sets our nation apart from others is that under our constitution, where individuals have a dispute, they have the right to have that dispute resolved under the law in a court of law by citizen judges who are their peers, members of the community who have the education, the experience and the backgrounds

you have, not professional judges who day in and day out decide matters and cases.

And so I would hope recognizing that it is inconvenient for you to be here, that you would recognize that if your own rights were at stake in a case, you would want to have persons who were willing to serve, who would be conscientious, open-minded and fair to make the ultimate decisions in the case that will have to be made.

We understand that, based on the projected length of the trial, that almost all of you have been at least alerted to the fact that this trial is estimated to take 30 to 45 days. We can't give you an exact estimate, but what I can assure you is this: That nobody is more conscious of the value of your time and the convenience that if we ask you to come here to serve on a jury, we will now make a commitment to you and the attorneys join me as officers of the Court, we will not waste your time, we will not keep you waiting, we will not be doing things while you're sitting around. The time that you spend here will be productive. You will be engaged and we are going to be entirely respectful throughout the case to be sure that your time is being effectively and efficiently utilized.

Let me start by telling you the purpose of jury selection and why we start a trial with this process. Because the parties are entitled to have this case decided by a jury, under the law each party has a

right to select those persons who will serve as jurors. That means that to be able to make effective selections, informed choices, it is only fair and reasonable that the parties learn something about you, your backgrounds and the way you think about the kinds of issues that are going to be presented in the case. It is not because they're nosy, not because anybody wants to invade your privacy, but rather simply to enable the parties to make choices that are intelligent and for no other reason.

The process of jury selection is essentially one that has for its purpose the identification and then the assurance that we identify and ultimately select individuals who are willing to be open-minded, who will be fair, who do not have any preconceived ideas or notions about the issues in the case, who don't have any inclination to either favor or disfavor either party in the case, any party, any witness or any issue.

And so the process that we're going to engage in is designed to do that. And as we go through this process, I'm going to ask that each of you search your mind and your heart to be sure that the answers that you give us to the questions are accurate so that we will have a clear picture and an understanding of your views on the subjects about which we are going to be inquiring.

For those prospective jurors who are still seated in the audience portion of the courtroom, I will make

the request of you that you please listen to all the proceedings as they are ongoing as I ask questions and others ask questions and the prospective jurors answer. The chances are very good that you're going to be called into the jury box before we're done. And when that occurs, I'm going to ask you if you know anything about the case or anybody associated with the case, and then if you have heard my questions. And then I'll specifically ask did my questions raise any issues for you. If you've been listening, you'll be able to answer the question. If you haven't listened, then I'm going to have to ask a large number of questions all over again. And that gets very repetitive and time consuming. And so we would please ask all of you who are not in the jury box per se to listen because, as I've indicated, the chances are good that we will be asking the questions of you.

Now, I'm going to, as the first order of business, introduce you to the parties, their attorneys. I'm going to give you a very brief description of the case. And in doing that, please understand that what I say is not evidence. I was not a witness to nor was I present when any of the events that are at dispute in this case occurred. I will be providing you information that has been provided to me only. And so, of course, you should not, other than to orient ourselves for the answering of questions, you should not take anything that I say as being evidence or as establishing anything in this case. It does not.

I'm going to then give you a list of persons who may be called as witnesses. The fact that I name these witnesses doesn't mean absolutely that any of these individuals will be called. Rather we give you all the persons who possibly could be called, again, so that you can tell us do you recognize the individual. If so, would it make any difference to you in the way you listen to or evaluate testimony based on who the person is and what their relationship is to you.

So let me start now by telling you about the parties in the case. In a civil lawsuit, the parties who bring the case are called plaintiffs. And that is a legal term that is neutral in its effect. In other words, being a plaintiff isn't good, it isn't bad, it simply denotes that this is a person who has brought a lawsuit. In the case, the parties against whom the lawsuit is brought are called a defendant or defendants. And in had case, there is a single defendant. And I'll be telling you something very shortly about the defendant.

The first thing I'm going to do, however, is to give you the names of the plaintiffs. And these persons are Martha Rivera, Mao Her, Alicia Alvarez, Eva Arriola, Peuang Bounnhong, Rosa Ceja, Chhom Chan, Bee Lee, Paul Martinez, Maria Medina, Mai Mee Moua, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria

Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, See Yang and Xhue Yang.

In this case, the party against whom the suit is brought is a corporation. And a corporation is a form of business entity that is authorized by law. In the eyes of the law, a corporation is a person and a corporation is entitled to the same fair consideration and treatment as any individual human being.

The defendant in this case is named Nibco, Inc. and it is an Indiana corporation. Meaning that is its state of incorporation.

In this case, I'm now going to tell you briefly what the lawsuit is about. Remembering that what I say is not evidence. The plaintiffs are individuals who are of Asian and Hispanic descent and they worked at a plant located in Fresno, California for their former employer, Nibco, Inc., the defendant.

The plaintiffs in this case sue the defendant for two alleged – and when I say alleged, I mean this is what is claimed and it will be the duty of the party who has a claim or who has an affirmative defense, to prove the claim element by element or the affirmative defense element by element by the standard of proof that's required in a civil case, and I'll discuss that with you in just a few moments.

Essentially, there is a claim brought under federal law for national origin discrimination and a claim brought under the state law for national origin discrimination. And this arises out of the workplace

where the employer took certain actions that are complained of by the plaintiffs. And I'm going to let the parties and the evidence discuss that. But I'm going to briefly state that, in very summary fashion, the plaintiffs claim that they were tested and then subject to a layoff policy that was used by the corporation. They claim that that was in violation of law. And that that included the testing of the plaintiffs. And you will hear what the claims are with regard to that. And that the test was used in a way that selected employees to be laid off in a certain order.

The defendant Nibco, Inc. denies all the allegations of the plaintiffs' claims. It asserts that the actions that it took and the tests that it gave were related to the jobs that the plaintiffs had and that there was business reason or necessity at the Fresno plant for the testing and the other activities that occurred.

Nibco denies that it discriminated against any plaintiff on account of national origin. And as I've indicated, denies any kind of wrongful action in the case.

In the case, the plaintiffs seek the remedy of what the law calls damages. And under the law, when a person's rights are violated, and they prove to the required standard of proof the truth of those claims as a remedy for the claims, the law permits an award of damages. What are damages? Damages

is money. Is there are two types of damages that are sought in this case. The plaintiffs seek what are called compensatory damages, that is to compensate for any alleged harm that has been suffered. And the second kind of damages sought are called exemplary or punitive damages, and those are damages that may be awarded, they never have to be awarded, but they may be awarded if the requisite underlying conditions are proved. And that is that in engaging in any unlawful conduct, the party accused acted with malice, fraud, oppression or the conduct was what the law calls despicable. And I will define those terms for you later in the case when and if that becomes appropriate.

Now, the next thing I'm going to do is to give you the names of the prospective witnesses in the case. And these are all the plaintiffs that I have previously identified, and I'll go over the list with additional names in addition to the plaintiffs.

Alicia Alvarez. Anita Escamilla. Art Gonzalez. Bao Nhia Moua. Bill Lee. Bill Baxter. Bill Lepowsky. Chhom Chan. Connie Rosato Williams. Danny Yang. Darcey Voyles. David Wendroff. Doug Kieper or Kieper. Earnest Harper. Edward Newbegin. Eliseo Avitia. Eva Arriola. Gloria Watson. Henry Medina. Isidra Murillo. Jim Polian. Karen Bowerman. Long Thao. Margarita Mendoza. Mai Mee Moua. Mai Youa Xiong. Mao Her. Maria Rodriguez. Maria Navarro. Maria Ruiz. Maria Medina. Maria Valdivia. Mark

Rein. Martha Rivera. Ofelia Rivera. Paul Penerian. Paula Martinez. Peter Scontrino. Peuang Bounnhong. Rick Krauth. Roseann Gonzalez. Sara Rivera. Sy Yang. Southone Bounphonh. Steve Brunnengraeber. Sky Vang. Vath Rattanatay. Vina Robledo. Visal Long. Joseph Penbera. Francisco Gomez. Thelma Alexander. Don Alford. Laurie Allen. Jose Alvarez. Miguel Alvarez. Robert Alvarez. Frank Anderson. Maria Anguiano. Rosalia Anzaldo. Jean Pierre Ardans. Tado Ardenas. Marcus Avalos. Martin Avitia. Gerald Barrett. Dr. Jose Luis Bautista. Bill Baxter. Brandon Beard. Paul Bergen. Raymond Betancourt. Regina Bezold, also known as Staiger. She also has a business called Central Valley Resources. Anna Blake. Southone Bounphonh. Richard Bowers. Rian Bouman. R. Brown, MD. Dina Buchanan. Doug Bunting. Ruben Burnias or Burnias. Katherine Burns also known as Katherine Brown. Kristen Burrows. Wayne Butler. Jeffrey Butting. Joe Byles. Dustin Cabral. Mike Carlton. Patricia Carrera. Lawrence Carter. Emma Castro, M.D. Randy Cates. Tony Cazares. Greg Ceballos. Rosa Ceja. Jeffrey Chavez. Frank Cohan. Malcolm Cohen. Ron Crook.

And then there are going to be a large number of custodians of records. We don't know who the exact persons will be, but these are normally people who bring documents to court. They identify the documents as being authentic and lay a foundation

for their admissibility into evidence. They will include records of the Angels of Grace, for Aramark, for Aquarius aka Agricultural Products. For the Asian Vocational Center. Bally's Total Fitness. BeautiControl, Inc. Bucker Turf Irrigation. California Industrial Service. Catholic Charities. Central Valley Resources. Central valley Children's Services. Complete Labor Service, Inc. Dumont Printers. Fresno Production Payroll. Fresno Unified School District. City of Fresno. Genesis. Harris Ranch Beef. Hickory Farms. Hoff Farms. Holcomb Products. In-House Supportive Services. IHG Resources. J's Construction Cleaning. Jet Plastica Industry. Lorena Restaurant. Madera Uniform & Accessories. Manusum Raisin Packing House. Morgan & Company. Netafim. Opportunities Plus. Pacific Image, Inc. I'm sorry, Pacific Image USA. Pacific Choice Brands. Placement Pros/Vedior. Pleasant Mattress. Producers Dried Fruits. Quist, that's the AJ Quist Dairy. Rain Creek Bakery. Reliant Building. Ridgeglass Shingle. Sani-Kleen Janitorial. Select Personnel Services. Social Security Administration. Specialty Branded Products. Table Mountain Casino. Valley Staffing. Varsity Contractors. Volt Management for Aquarius. Wade Manufacturing Company, Inc. Wawona Frozen Foods. Wawona Packaging. Zacky Farms. XanGo Texas. Zee Medical. Ernst Hardware. US Equal Opportunity --that should be Equal Employment

Opportunity Commission. Fresno City College. Central Unified School District. The Employment Development Department. Chin Minh Dao, Douglas Deffenbach. Abraham DeKruif. John G. DeLaMora. Nicholas Delgado. Aaron DeOcio. Albert Diaz. Nouphinh Donangtavanh. Julie Dooley. Jim Drexinger. Alicia Duncan. Brian Enos. Anita Escamilla. Maria Farias. Michael M. Farrell. Julia Figueira-McDonough. Jay Finkelman. Margaret Franchi. Salvador Galaviz. Eusebio Gamez. Maria Elena Garcia. Rita Garcia. Ruben Garcia, Yolanda Garcia. Carlos Garza. Fermin Gasca. Stanley J. Gigel. Tim Giger. Linda Goldsberry. Francisco C. Gomez, Ph.D. Arturo Gonzales. Rene Gonzales. Roseann Gonzalez. Sue Goodwin. Lawrence Grauvogel. Jeffrey Griffin. Joe Gross. Sonia Guillen. Alex Guillory. John Hall. Roger Hanson. Earnest Harper. Stan Hawkins. Jeremy Hayes. George Helton. Youa Chao Her. Augustine Hernandez. Bruce Hill. Joe Hlade. Timothy Hough. Dean James. Janet Jimenez. Jorge Jimenez. Cheryl Jones. Wayne Kelley. Boukahay Keohanan. Dr. Ajit Khaira. Lisa Khang. Rick Krauth. Rob Krok. Dr. Lai. Larry Lane. Matt Langa. Dr. Latisane. Gary Ledbetter. Kermit Littleton. Visal Long. Vorleak Long. Todd Loomis. Griselda Lopez. Suzanne Louthan. Mark Luger. Richard Luna. Luu Mai. Anthony Malt. Robert Malt. Israel Mancias. Dave Mannerino. Evelyn Manzo. Rex Martin. Angel Martinez. Arturo Martinez.

Christine Martinez. Maria K. Mayrand. Steven McCue. Henry Medina. Walter Medina. Richard Meyer. Karel Millar. Kevin Miller. Matt Miller. Dirk Milligan. Dr. Ram L. Mittal. Roger Moitoso. Norma Morales. Ken Moreno. Norma Morales. Mai Moua. Steve Mullins. Teresa Munoz. Bryan Murillo. Ramon Navarette. Todd Nowicki. Sylvia Olivia. Dr. Adrianna Padilla. Maria Paredes. Dennis Parker. Arlie Patton. Livier Pelayo. Cindy Perales. Enrique Perez. Martha Perez also known as Martha Inzunza. Samang Phelan. Dr. Apai Polyudhapoom. Eric Ramirez. Gloria Ramon. Mike Ranieri. Surabhan Ratanasen. Mike Rein. Mike Repucci. Jessica Richardson. Aureliano Rios. George Rios. Gustavo Rivera. Maria Robledo. Vina Robledo. Hortencio Rodriguez. Joe Rodriguez. Lisa Rodriguez. Mauricio Rodriguez. Rachel Rodriguez. Rosemary Rojas. Margarita Romero. Williams Rosato, Connie AKA Connie Hitt. Craig Roth. Jose Ruiz. Patrick Ward Rundle. Jennifer Rydia. Amalia Salinas. Solomon Sanchez. Jagdip Sandu. Rick Sarkisian. Lynn Sayre. Dan Schueler. Alex Singh. Fred Howard Smiley. David Smith. Miriam Mott Smith. Sodavy Sokham. Maria Soto. Dave Seele. Patricia Steele. S. Sterling. Joni Stuart. Carlos Sueldo. Savean Suon. Edward Sutton, he's a doctor. Norm Swanson. Miguel Talamantes. Ge Thao. Long Thao. Sopheap Thong. Arturo Torres. Michael Turner. Jason Upshaw. Mirella Uriarte. Violet Valdez. Maria Valdivia. Chao

Vang. Oralia Velasco Jose Villa. Craig Vilhauer. May Vongsing. Dr. Winthrop Ware. Gloria Watson. Dave Wendroff. Kathy Westerman. Gerald Whiteford, Ryland Williams, Jerad Wotjas. April Wright. Phil Wyatt. Chao Yang. Mai Yang. Xhue Yang.

Now, I'm going to introduce you to the parties and to their attorneys and then I'm going to be asking a question of the 21 of you who are seated in the witness box.

In this case, the plaintiffs are represented by attorneys William J. Smith, Christopher Ho and Shelley Bryant. And I'm going to ask for these attorneys to please introduce themselves and anybody else they wish to have the jury meet.

MR. SMITH: Good morning. My name is William J. Smith. And my office is also represented by Shelley Bryant, another lawyer in our office. And Christopher Ho can introduce himself. He's an attorney also representing the plaintiffs. And Karen Coonan is here to assist us this morning.

MR. HO: And my colleague Christina Chung is also working with us on the legal team for the plaintiffs.

THE COURT: Thank you very much. In this case, the defendant is represented by attorney William Hahesy and attorney Michael Helsley. And I will ask now for counsel to please introduce themselves and anybody they wish the jury to meet.

MR. HAHESY: Yes. My name is Bill Hahesy. And seated with me assisting in the case is Barbara Swain. Kelly Ebert. And I'd like to introduce Mr. Douglas Kieper and Mr. Tom Eisele, both of whom are with the defendant Nibco, Inc.

MR. HELSLEY: Good morning, my name is Michael Helsley and I'm one of the attorneys for the defense Nibco, Inc.

THE COURT: Thank you very much. My first question, ladies and gentlemen, is do any of those of you who are seated in the jury box, recognize anything about the case, have you ever heard of the case? Do you know any of the attorneys, the parties or the prospective witnesses? If you do, I'm going to ask that you please raise your hand.

Nobody raises a hand. And from this, we infer that you don't know anything about the case, you don't know the lawyers, the parties whose names are been read or any of the prospective witnesses. And if I could have just a nod to affirm that our assumption is correct by not raising your hand, all of you affirm that you don't know anything about the case or anybody associated with it. Everybody's nodded -- yes. Mr. Mello. Excuse me. Mr. Dias.

PROSPECTIVE JUROR NUMBER FIFTEEN: You read a Rick Sarkisian, I went to school with a Rick Sarkisian, but I don't know if that's --

THE COURT: Yes, that's what we want to know. Good. How well do you know Mr. Sarkisian?

PROSPECTIVE JUROR NUMBER FIFTEEN: We were good friends in high school.

THE COURT: That's a few years ago.

PROSPECTIVE JUROR NUMBER FIFTEEN: Quite a few years ago.

THE COURT: All right. And have you seen him since high school?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: All right. And have you made any --maintained any kind of communication with Mr. Sarkisian?

PROSPECTIVE JUROR NUMBER FIFTEEN: No.

THE COURT: Do you know what kind of business or profession Mr. Sarkisian went into?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, I don't.

THE COURT: You do not. So you haven't kept up with him?

PROSPECTIVE JUROR NUMBER FIFTEEN: No.

THE COURT: And the two of you don't have any contact.

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: Would the fact that you had gone to high school and you were friends back then make any difference if Mr. Sarkisian comes in to the

courtroom, gets on the witness stand and testifies under oath in the way you would listen to his testimony? Would you treat him differently from the way you would treat any other witness?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, I wouldn't.

THE COURT: All right. Does Mr. Sarkisian start a little bit ahead because of your prior knowledge of him, of anybody else in terms of accepting what he says?

PROSPECTIVE JUROR NUMBER FIFTEEN: No.

THE COURT: All right. You would objectively evaluate the quality of his memory, his powers of perception, his ability to relate what he is testifying to, the fact of whether he's inconsistent in any respect in his testimony, whether he has any interest in the outcome of the case and many other factors before you decide how much weight to give his testimony?

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: You would do that. And you'd treat him just like any other witness?

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: All right. Thank you very much for sharing that with us, Mr. Dias.

Anybody else have any knowledge concerning anybody associated with the case or the case itself?

Nobody indicates that they do.

Let me now introduce you, ladies and gentlemen, to the standard of proof which I have mentioned. Some of you may have had prior jury service. And this, of course, pertains to everybody who's sitting in the audience as well And if you have had prior jury service, the chances are a little better that that was criminal rather than civil. And for those of you who had, who have sat in a criminal case, you will recognize very shortly that there is a different burden of proof in a criminal case. And for that reason, I'm not going to mention it because it doesn't have anything to do with our case. In our case, the burden of proof is unless I instruct you otherwise on any issue, if a different burden of proof pertains, I will tell you that and I will define that burden for you. But the generally applicable burden of proof to this case is proof by a preponderance of the evidence.

Now, what does that mean? Let's define the standard. By a preponderance of the evidence is meant evidence, when considered with all the evidence in the case, that has such convincing force that you can say that any matter to be proved under this standard is more likely true than not true.

Now, does this sound somewhat obscure or uncertain? I've given you the definition. Let me give

you a graphic example. If we start with the scales of justice equally balanced. When a party has the burden of proof by a preponderance of the evidence, that means that the evidence presented --and it doesn't just have to be by the party that has the burden of proof. It's from all the evidence in the case. When there is enough evidence on a particular issue to cause the scales to tip in favor of the party who has the burden of proof on any issue, then on that issue the evidence preponderates. If, after considering all the evidence, you've heard some testimony for a position, against a position, you've looked at some issues. And after all of that, here the scales of justice, they haven't tipped either way. They're still in equipoise. That means that then the evidence has not preponderated and your finding is against the party who has the burden to prove that issue by a preponderance of the evidence.

The third case is, considering all the evidence in the case, it goes the other way. It tips the scales against the party who has the burden of proof on any issue or claim or defense. And then your finding is against the party who has the burden of proof because the evidence does not preponderate.

Now, for the 21 who are seated. Has everybody been able to follow the definition and the graphic explanation of how the burden of proof preponderance of the evidence works in a civil case?

If you don't, please raise your hand. Yes. Would you like me to repeat it?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: All right. By a preponderance of the evidence is meant, considering all the evidence in the case, the evidence has such convincing force that you can find that whatever matter is to be proved is more likely true than not true. That means that we start with a level playing field. The scales are equal. They're in equal balance. The party with the burden of proof has to bring evidence to the jury that causes the scales of justice to tip in favor of whatever issue it is. For instance, if the issue to be proved were is the judge's robe black? And we had a witness who came forward, was put under oath and said, I just looked at the judge, his robe is black. That would be enough evidence, if you believe what the witness says, to tip the scale to preponderate. And then your finding would be in favor of the party who has to prove the judge's robe is black.

If the evidence, the first time I sit down I'm wearing a black robe and then when we come back from lunch recess, I've got a red robe on. And so one witness testifies the judge was wearing a black robe, the second witness testifies the judge was wearing a red robe and they don't bother to say what time they observed the judge, then your finding would be it's black or it's red, we can't – we don't have enough facts to decide. So the scales don't tip.

If the witness had testified the judge is sitting, wearing a black robe and had testified, I just looked at the judge, the judge is wearing a red robe, then the scales tip the other way because the judge, according to the witness testimony, is wearing a colored robe that everybody else who testifies says is black. Do you understand how the preponderance o evidence standard works in application?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Good. Thank you. Anybody else who has any difficulty or any hesitation understanding this principle?

Now, the next question is going to be specific and then I'm going to discuss a general principle that relates to the specific. My first specific question is: Knowing what the standard of evidence is that applies in this case, would each of you be willing to follow the law and apply that standard to your decision making? Anybody who would be unwilling or unable to do that, please raise your hand.

Nobody indicates that they would be unwilling.

Now I'm going to ask you the general question. This is a very important question. All the questions are important. But this one has to do with following the law. I'm going to now be asking each of you to give us a commitment that you will follow the law as I am obligated to state it to you at the end of the case, even though you don't know what the law is. Is this unreasonable? Is it unfair? Let me explain why

it is not. In our system of justice, we have a separation of responsibilities and of authority. And in the broader sense, the legislature makes the laws of our nation. We elect Congress people, senators and representatives to make the laws of the United States. They make the laws and then it's our duty as citizens to follow the laws. Sometimes even if we don't know what the laws are. You've heard the term ignorance of the law may not be a defense if the law doesn't require knowledge as a specific element. And so what this means is that the laws that apply to this case were enacted either by the United States legislature or the State of California legislature. And all of us have the duty to follow them.

Let me give you another graphic example. I took an oath in taking this job to uphold the constitution of the United States and to follow the law as it exists. That means that I must apply the law as Congress enacted it. I do not have the ability nor the luxury of deciding a case the way I think the law should be. I must follow the law as it's enacted. What does that mean? That means that every year I make decisions that personally I don't agree with. I wouldn't make the decision if it were up to me to say what the law is. But I don't have that ability. The law doesn't give me that authority. I must follow the law. And we're asking that each of you do the same and no more. Even though you don't know what the law is, may I have your commitment, please, each of

you, that you will follow the law as I state it at the end of the case. Anybody who would be unwilling or unable to do that, please raise your hand.

Nobody does. And we thank you for that. That is the way our society functions under a rule of law by having everybody in our nation follow the laws whether we agree with them or not. And of course, when you don't agree with the law, when you don't think a law is a good law, you have resource because you can petition the legislature to change the law.

Now, in a lawsuit, the role --each of us has a role. The role that you will be asked to play is that of judges of the evidence. That means that you will hear testimony, you'll view exhibits, you'll accept any instructions where there's been an agreement that a fact is proved or I advise you that the law establishes a certain principle. And then as the case is presented by the attorneys, by calling witnesses, by offering exhibits, the parties will rest, meaning they will close the evidence. I'll instruct you on the law that governs the case. Then the attorneys will present summations in which they will argue what the law has or has not, in application, been satisfied in the case by the evidence. And after that, you will go to the jury room to deliberate on your verdict.

That process is in a place that is secret, nobody can listen to the deliberations of a deliberating jury. Nobody's entitled to know what a jury is thinking. Your process of decision making is completely secret

and the only thing that is announced after the case is your verdict.

Is there anybody who would be unwilling and unable, after hearing all the evidence in the case, to enter the jury room and then to share your views with your fellow jurors, discuss what you think of the evidence, discuss what you think of the law in relation to the evidence, and then vote your conscience to reach a verdict. Anybody for any reason, whether it's a principle or philosophy, is anybody unable or unwilling to discuss the case after hearing all the evidence, to express your own individual opinion about the issues to be decided, and then to vote your conscience to reach a verdict. Anybody who would be unwilling or unable to do that, please raise your hand.

Nobody does. And again, we thank you for your willingness to participate as a juror because it is very important that each juror express her or his views about a case in deliberations.

Now, under the law, the plaintiff who brings the case on issues that I will advise you, has the burden of bringing evidence and proving the case. For that reason, the plaintiff will go first. And that means you're going to hear an opening statement, which is what the parties expects the evidence in the case will show. You're going to hear the plaintiffs' witnesses before you hear anything from the defense.

Now, in life, I suspect that your experience that there are usually two sides to a story. And so it is very important that all of you, if you're selected as jurors, keep your minds open throughout the course of the trial, in the jury room, deliberating, listening to the views of your fellow jurors, reviewing all the evidence before you make up your mind and vote your conscience. In other words, what we don't want is for somebody to pre-judge, for someone who reach a snap decision and then if you hear more evidence, or you see more exhibits, your view changes. And we don't want you walking in a position and that will get to another rule about not discussing the case before you deliberate. And that's the reason for that. But is there anybody who would be unwilling or unable to keep her or his mind open until the end of the case when you're deliberating? If you'd be unable to do that, please raise your hand.

Nobody has raised their hand.

Let's assume that you've done that. You've maintained an open mind. You've discussed the case fully with your fellow jurors. You've voted on the prospective verdicts. And you look at the results of the vote and it turns out that most of the other jurors have a view of the case that's different from yours. They all are voting yes and you see it as no. Is there any one of you who would be unable or unwilling to reconsider your initial position, to listen to the views of your fellow jurors and to determine

whether or not your initial decision is the right decision under all the circumstances of the case. In other words, are you a person, once you make up your mind, that's it and you don't look back. Is there anybody who would be unwilling or unable in deliberations to reconsider an initial position to discuss the matter with your fellow jurors to see if you can reach agreement? Anybody who would be unwilling or unable, please raise your hand.

Nobody indicates they would. Now I'd like you to make a further assumption. You've done it. You've reconsidered all the views of your fellow jurors, you've reviewed the evidence, you're more convinced than ever and you're satisfied that your decision is the right decision. Is there anybody among you who would be unwilling or unable to stand by a principled decision and not change your mind simply for the convenience of reaching a verdict? In the vernacular, this is called sticking to your guns.

Is there anybody who would be unwilling or unable to stand by your own principled decision if you were satisfied it was right? Please raise your hand.

Nobody indicates that they would be unwilling or unable to do that. I'm going to say one more thing before we take --ask one more question before we take the noon recess. And I'm hoping that everybody agrees. We'll only take an hour for recess today because we want to complete our jury selection. And

for those of you who are not selected to not keep you around all day.

The final question I'm going to ask before we take the recess is in the case, there may be testimony by one witness that is different from the testimony of another witness on the same subject. Like the red/black robe. Two witnesses seeing it differently. Part of your function as a juror will be to resolve that difference. To decide the issue of how much weight to give any evidence in the case and which witness to accept. You can accept everything a witness says. You may believe part of what a witness says or none of what a witness says. That matter is entirely up to you as prospective jurors. Is there anybody who would be unwilling or unable to make those kinds of decisions? We call them, in the law, credibility decisions. Credibility is a legal term for believability. In other words, if you have to resolve who you're going to believe and how much weight to give testimony, is there anybody who would be unwilling or unable to do that? Please raise your hand.

Nobody indicates that they would be unwilling or unable.

Now what we're going to do, ladies and gentlemen, is we're going to take our noon recess. And in doing this, let me mention a principle that I'll be discussing throughout the trial. The law to avoid pre-judgment, requires that you not discuss the case

while it's in progress before you're actually in the jury room deliberating. That means even though all you know about the case is what I've said, you can't discuss it. You can discuss the weather, you can discuss this beautiful new courthouse, you can discuss how your feeling about being here for jury service, but please don't discuss anything about the case or anybody who has anything to do with the case. We're going to take a recess and I'll ask that we all reconvene at one p.m.. and let me mention one thing about that. All of us have to be here because all of you have to hear everything that goes on. Everything that I say and that others say in this process. And so we can't start without you. And what will happen is if one of you is late, we will all be sitting here in our seats awaiting your arrival. And so if you would, please, all be back by one p.m.. remember my admonition not to discuss the case or form any --form or express any opinions while we're in recess. We'll now stand in recess until one p.m.

(The jury panel left the courtroom.)

[. . .]

(The jury panel entered the courtroom.)

THE COURT: Apparently we have a few prospective jurors still downstairs. We'll wait just a couple of minutes and hopefully they will arrive.

All right. Ladies and gentlemen, we're going to get started now. And after covering the matters that we have, we're now going to get you involved in the process. And what I'm going to ask that each of you provide, and when you do this, you can remain seated. I'll ask that you first state your name, your general area of residence, southwest Bakersfield, Lemoore, northeast Fresno, west Modesto, your general area of residence, how long you've been there. We'd like to know your highest level of education. I have two years of high school, I graduated from high school. Whatever your education is. We'd like to know your activity or endeavor, whether you're a homemaker, actively employed, retired, not currently working. What you did if you ever worked when you worked and if you're going to return to work, what you intend to do when you return to work. We'll also ask, please, if you have a spouse, that you tell us what your spouse's occupation is.

The next subject is that of jury service. Have you served on a jury before? And if so, there are two things we want to know. Was the case a civil case or a criminal case? Did the jury reach a verdict? Not what the verdict was, that is unimportant. Simply I served on two juries, would not was a criminal, the

second was a civil. In the criminal case, we were unable to reach a verdict, the jury hung, we reached a verdict in the civil. Don't tell us what the verdict was, please.

The next subject is other court experience. In this, we're talking about have you ever been in a court before, were you a party, did you sue somebody, did somebody sue you? Were you a victim in a criminal case? Were you accused of a crime? Have you appeared as a witness? Have you been involved in any kind of disputes where either you were a claimant or someone was making a claim against you. We'd like to know any of that kind of history that you have had. That concerns what I call other court experience. Other than jury service.

The next subject area is whether you have ever had any issues in your workplace or job. By that, we mean have you ever made a complaint about your job or anybody at your workplace. Did anybody make a complaint about you. Have you ever been involved in a dispute involving your job or your workplace. Have you ever been in a lawsuit or an administrative hearing. Have you ever filed a claim with an administrative agency that concerns your employment or your job? Anything that would have to do with your employment, either very positive or in any way negative, we'd like to know about it.

We would also like to know if you have had, as either a supervisor, a manager or the owner of a

business, any experience in the managing of a workplace or the managing of other people. And if so, we'd like you to tell us if you have had such experience.

You know the nature of this case, this case involves allegations that employment rights of the plaintiffs were interfered with on account of their national origin and that they were ultimately laid off from their jobs on account of their national origin. Could you hear this kind of a case with an open mind? Is there anything about the nature of the case or anything that you have heard that would cause you any hesitation in being fair and open-minded to each side? Because each side of the case and each party is entitled to the same fair consideration as any other person or firm who is in the case.

And then, the last question is, again, we recognize hardship, but hopefully it would be an extreme hardship such as a precommitted, prepaid vacation, which could not be changed.

The last question will be is there any reason you'd be unable to serve on our jury. So I will help you remember these questions as we proceed. We're going to start with Mr. Galvan. You're number one.

THE CLERK: Into the mike, you don't need to press anything, just hold it up and talk into it. It's on.

THE COURT: So if you could, please, state your name.

PROSPECTIVE JUROR NUMBER ONE: Jesus Galvan.

THE COURT: Your general area of residence?

PROSPECTIVE JUROR NUMBER ONE: Southeast Merced.

THE COURT: How much education do you have?

PROSPECTIVE JUROR NUMBER ONE: Four years of high school. I graduated.

THE COURT: What activity or employment do you have?

PROSPECTIVE JUROR NUMBER ONE: I'm actively employed.

THE COURT: In what capacity?

PROSPECTIVE JUROR NUMBER ONE: I am a project manager in a glass company.

THE COURT: All right. And what's the basic nature of that work?

PROSPECTIVE JUROR NUMBER ONE: Managing projects, you know, glazing projects, glass and stuff. I –

THE COURT: Would this be residential, commercial.

PROSPECTIVE JUROR NUMBER ONE: Commercial.

THE COURT: Industrial? Commercial?

PROSPECTIVE JUROR NUMBER ONE: Commercial.

THE COURT: All right. So this is big glass?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Thank you. Do you supervise others?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Does someone supervise you?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Closely or is it --or are you pretty much independent in doing your job?

PROSPECTIVE JUROR NUMBER ONE: Pretty much independent.

THE COURT: All right. The next question is do you have a spouse?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: And is she employed outside the home?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: What is her endeavor?

PROSPECTIVE JUROR NUMBER ONE: She's an administrative assistant for the University of California Merced.

THE COURT: Thank you. Jury service. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: How about any court experience?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: All right. What is that?

PROSPECTIVE JUROR NUMBER ONE: I was a witness about 13 years ago.

THE COURT: What kind of a case was it?

PROSPECTIVE JUROR NUMBER ONE: It was a criminal case.

THE COURT: All right. And were you a witness to a crime?

PROSPECTIVE JUROR NUMBER ONE: You could --well, yes and no.

THE COURT: All right. Did you actually make it into the courtroom?.

PROSPECTIVE JUROR NUMBER ONE: Yes, I did.

THE COURT: You're covering your bases.

PROSPECTIVE JUROR NUMBER ONE: I sat in the witness.

THE COURT: You actually got in the witness box, you took the oath and you testified.

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: How did that experience go?

PROSPECTIVE JUROR NUMBER ONE: From what I remember, pretty good.

THE COURT: All right. There was nothing that was so uncomfortable or difficult about that that you're sour on the legal system?

PROSPECTIVE JUROR NUMBER ONE: No. I was only 11 years old.

THE COURT: All right. Thank you. How about other court experience?

PROSPECTIVE JUROR NUMBER ONE: Yes. I was --I received a misdemeanor for disturbing the

peace and an assault and battery back four years ago.

THE COURT: All right. Do you believe that you were fairly treated?

PROSPECTIVE JUROR NUMBER ONE: For the most part, yes.

THE COURT: All right. I mean, is this something that was justified, that you were maybe a little out of line or was it just not fair, not right?

PROSPECTIVE JUROR NUMBER ONE: No. It was --it wasn't out of line.

THE COURT: All right. Did did the case ultimately work out all right?

PROSPECTIVE JUROR NUMBER ONE: I pled no contest.

THE COURT: Is the case now over?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: And anything that is lingering or that still has any effect on you that could spill over on to our case?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Our case is a civil case. It's completely different.

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Agreed?

PROSPECTIVE JUROR NUMBER ONE: Uh-huh.

THE COURT: Good. How about other court experience?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Let me ask you one more question about your case, the misdemeanor case you told us about. Did you make it into the courtroom --

PROSPECTIVE JUROR NUMBER ONE: Yes, sir.

THE COURT: --in that case. And was the process acceptable? In other words, did things work to your satisfaction or were there any problems?

PROSPECTIVE JUROR NUMBER ONE: No, there wasn't any problems.

THE COURT: All right. So overall, you'd prefer not to have had that experience, but it's nothing that is giving you any issues today? Would that be a fair statement?

PROSPECTIVE JUROR NUMBER ONE: Uh-huh.

THE COURT: And can you assure us that it won't impact our case?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Good. Now let me ask if you have any disputes, been a party to any disputes, has anybody made a complaint against you, have you made a complaint about someone else? Got a product that didn't work. Ever had to file a lawsuit. Anything like that?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: None whatsoever?

PROSPECTIVE JUROR NUMBER ONE: None whatsoever.

THE COURT: All right. So other than what you've told us about, the two experiences, no other exposure to courts or lawyers or judges?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: All right. Now, how about any issues in the workplace, have there ever been any of those?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: You haven't made any complaints, nobody's made complaints about you?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: All right. And has there been any kind of issue that you have experienced that has to do with your job and your work, your employer, that could impact our case in any way?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: All right. Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Thank you very, Mr. Galvan. Mr. Stein.

PROSPECTIVE JUROR NUMBER TWO: Thank you. David Stein.

THE COURT: What's your general area of residence?

PROSPECTIVE JUROR NUMBER TWO: Eight miles west of Modesto.

THE COURT: Your education.

PROSPECTIVE JUROR NUMBER TWO: Four years of high school and two years of vocational college.

THE COURT: All right. Do you have a job or endeavor?

PROSPECTIVE JUROR NUMBER TWO: Yes, I do.

THE COURT: And what is that?

PROSPECTIVE JUROR NUMBER TWO: I'm a commercial pilot and I engage in the world of crop dusting.

THE COURT: All right. Did you have military service?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: In other words, your piloting skills and licensing has all been achieved privately?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. And so how long have you been piloting?

PROSPECTIVE JUROR NUMBER TWO: Commercial or total?

THE COURT: Total.

PROSPECTIVE JUROR NUMBER TWO: 24 years.

THE COURT: All right. And besides the crop dusting, what other kind of commercial piloting do you do?

PROSPECTIVE JUROR NUMBER TWO: What other kind can I do?

THE COURT: Yes. Do you do. Besides crop dusting.

PROSPECTIVE JUROR NUMBER TWO: None at this point. I recently went through training to fly fire bombing airplanes. I've completed that.

THE COURT: All right. And so that would be like for fire suppression efforts and the like?

THE WITNESS: Yes.

THE COURT: Would you do that as a contractor or would you join some kind of a law enforcement or other fire protection agency?

PROSPECTIVE JUROR NUMBER TWO: I would work for a civilian company and they have the contract with -

THE COURT: I see.

PROSPECTIVE JUROR NUMBER TWO: -- governments.

THE COURT: And are those multiengine aircraft or single engine?

PROSPECTIVE JUROR NUMBER TWO: Single engine.

THE COURT: Thank you. Do you have a spouse?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: And what is her activity?

PROSPECTIVE JUROR NUMBER TWO: She's a courtroom clerk at Stanislaus County.

THE COURT: And is she assigned to a specific courtroom and judge?

PROSPECTIVE JUROR NUMBER TWO: Currently she is. She usually floats, but she's been in civil for at least a year and a half.

THE COURT: All right. Thank you. Has she had both civil and criminal experience?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. Does she discuss cases with you?

PROSPECTIVE JUROR NUMBER TWO: When they're over.

THE COURT: All right. If they're interesting.

PROSPECTIVE JUROR NUMBER TWO: Sure.

THE COURT: All right. And do you have a sense that in following the cases, as you have through your wife's description, any sense about the legal system that could impact our case?

PROSPECTIVE JUROR NUMBER TWO: I think it's too lenient a lot of times.

THE COURT: That's on the criminal side.

PROSPECTIVE JUROR NUMBER TWO: And --yeah, and civil gets out of control also.

THE COURT: All right. In what sense do you think civil gets out of control?

PROSPECTIVE JUROR NUMBER TWO: Lawsuits across America.

THE COURT: Too many lawsuits?

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: All right. Do you think if someone has a claim, that they should not take that claim to court?

PROSPECTIVE JUROR NUMBER TWO: If it's honorable and moral and valid, okay. I think a lot of them should be looked at closer.

THE COURT: All right. In other words, your sense is that there are some non meritorious, some meritless cases.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: That shouldn't be in the court system.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. Of course you're not saying that about this case.

PROSPECTIVE JUROR NUMBER TWO: I don't know.

THE COURT: Exactly. None of us know. That's what we're here to find out. But you don't have any inclination, your thought process right now isn't that, well, this is a bogus case? The fact that we're here. Where there's smoke, there's fire.

PROSPECTIVE JUROR NUMBER TWO: Hum, I think we see a lot of these cases; don't we?

THE COURT: We see a lot of cases. This is the busiest district in the United States.

PROSPECTIVE JUROR NUMBER TWO: Uh-huh.

THE COURT: So there is no question of that. Except for the Katrina cases, which aren't all active in Louisiana. But otherwise, the Eastern District is. Well let me ask this: Do you have a feeling that would be one of hesitation or one that either side of this case would have to do more than the law requires for you to essentially follow the law and reach a result?

PROSPECTIVE JUROR NUMBER TWO: When you read the list of names.

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER TWO: It took twelve minutes.

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER TWO: I have my suspicions already.

THE COURT: I have my suspicions too. Those are that we probably won't hear from all of those people. But out of an abundance of caution, if the attorneys don't list the universe of potential witnesses, in this courtroom, there is a rule that the witness can't be sworn and called. And therefore, to avoid being disabled from calling a witness, they have to list them all. And so we give you the list too so that you can tell us if you recognize anybody. But I expect when all is said and done, we won't be hearing from all those witnesses.

PROSPECTIVE JUROR NUMBER TWO: I understand.

THE COURT: Good. So let me get back to this -- this comfort level. Let's assume --I'll ask you to assume for the purpose of my question, assume that you have a case and you've brought it to the courtroom and you're going to now have your case. And let's say that it has something to do with your job and a matter of a claim about your employment.

Would you be comfortable having someone who thinks the way you think, who believes as you believe, with your education and background, serving as a judge of the facts in your case?

PROSPECTIVE JUROR NUMBER TWO: As a judge?

THE COURT: Yes.

PROSPECTIVE JUROR TWO: No.

THE COURT: In other words --you would not?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: That's because what reason?

PROSPECTIVE JUROR NUMBER TWO: How many defendants are there?

THE COURT: One.

PROSPECTIVE JUROR NUMBER TWO: That's the company?

THE COURT: That's the company.

PROSPECTIVE JUROR NUMBER TWO: Okay. And how many plaintiffs?

THE COURT: I believe 23.

PROSPECTIVE JUROR NUMBER TWO: Okay. 23 people have trouble at a job?

THE COURT: That's the case.

PROSPECTIVE JUROR NUMBER TWO: They could move on.

THE COURT: Well, apparently they all did. That's what the case is about.

PROSPECTIVE JUROR NUMBER TWO: Where did they go?

THE COURT: Well, that won't be relevant in this case. That could be another case. But in other words, why they're gone is what this case is about.

PROSPECTIVE JUROR NUMBER TWO: Uh-huh.

THE COURT: So --well, let me ask this straight on. Just from what you've heard, do you have a feeling, a sense that there's something about this case that isn't right?

PROSPECTIVE JUROR NUMBER TWO: At this point, yeah.

THE COURT: All right. Well I'll tell you what we're going to do, Mr. Stein. I think we'll get a different case for you to serve on because what we're hoping to find is individuals whose minds are completely open and before they hear the case and what it's about, if you already have what I call a preconception, then that would not be fair to either side.

PROSPECTIVE JUROR NUMBER TWO: Correct.

THE COURT: And so we'll thank --

PROSPECTIVE JUROR NUMBER TWO: Or the jurors.

THE COURT: We'll thank and excuse you from this case. Please call the number after five on Friday.

PROSPECTIVE JUROR NUMBER TWO: On Friday after five.

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER TWO: Okay. Thank you very much.

THE COURT: Thank you.

THE CLERK: Steven Sargent.

THE COURT: Good afternoon, Mr. Sargent. Have you heard all the questions?

PROSPECTIVE JUROR NUMBER TWO: Yes, sir.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: And have any of the principles of law or the rules about juror conduct that I've discussed raised any issues for you?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER TWO: Background is in --you've been asking just –

THE COURT: Exactly. We'll start with your name.

PROSPECTIVE JUROR NUMBER TWO: I am Steven Sargent.

THE COURT: Your area of residence?

PROSPECTIVE JUROR NUMBER TWO: Southwest Bakersfield. I am a self-employed license contractor.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER TWO: High school graduate.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER TWO: Yes, I do. She's a homemaker.

THE COURT: All right. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: Have you had experience with the court system?

PROSPECTIVE JUROR NUMBER TWO: Yes, sir.

THE COURT: All right. Can you tell us about that?

PROSPECTIVE JUROR NUMBER TWO: I've had a couple of misdemeanors.

THE COURT: All right. Did those matters -- well, first of all, do you think that you were fairly treated?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Because you shouldn't hesitate if you think that the law enforcement officer was wrong or there was not a righteous case, you tell us that.

PROSPECTIVE JUROR NUMBER TWO: No, sir, I --I was treated fairly.

THE COURT: All right. And those cases are over now.

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: And they don't have, as far as this case is concerned, any potential to impact your consideration if you're a juror?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: It's totally separate.

PROSPECTIVE JUROR NUMBER TWO: Totally separate.

THE COURT: All right. And can you give us some idea how long ago those occurred?

PROSPECTIVE JUROR NUMBER TWO: About 12 years ago.

THE COURT: All right. You were younger.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. Anything else about those two cases that you think could have any effect on being a juror here?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: Good. Put those aside. Any other court experience? Disputes? Ever been a victim of a crime? A witness? Anything like that?

PROSPECTIVE JUROR NUMBER TWO: Bankruptcy.

THE COURT: All right. And again, was that process one that you believe was appropriately handled?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Was there anything about that that was unfair or difficult?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: All right. And does that proceeding have any potential to impact this case?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: Good. Let me next ask about you're self-employed. Are you the boss?

PROSPECTIVE JUROR NUMBER TWO: The boss of myself, yeah. Well, my clients are the boss.

THE COURT: Understood. And are you a one-man operation or do you employ others?

PROSPECTIVE JUROR NUMBER TWO: I am a one-man operation, but I hire subcontractors for parts of my work.

THE COURT: All right. And so do you do residential work?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Do you do commercial work?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: All right. But you do get some bigger jobs where you need to have subcontractors?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. And so in those cases, recognizing they may be independent contractors, but nonetheless, do you generally provide them with the commands as to what needs to be done?

PROSPECTIVE JUROR NUMBER TWO: Barring that they should know the profession, yes, I basically have them there to do a particular job and -

THE COURT: Right.

PROSPECTIVE JUROR NUMBER TWO: Have expectation of qualities, yes.

THE COURT: You don't tell them how to do it or guide their work, but rather you say, we need to get this plumbing installed by thus and such a date.

PROSPECTIVE JUROR NUMBER TWO: Absolutely, yes.

THE COURT: And that's what they do.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: And hopefully they're competent and get the job done.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Have you ever been in a workplace where you worked with others besides yourself?

PROSPECTIVE JUROR NUMBER TWO: Absolutely, yes.

THE COURT: You've had jobs, in other words.

PROSPECTIVE JUROR NUMBER TWO: Oh, yes.

THE COURT: Any issues or problems in the workplace before?

PROSPECTIVE JUROR NUMBER TWO: As far as complaints or complaints against myself, no.

THE COURT: Complaints or being treated unfairly by an employer, anything like that.

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: All right. So you would say uneventful, your employment history?

PROSPECTIVE JUROR NUMBER TWO: Well, there's always employment issues, but nothing that was, you know, need to be brought to somebody's attention or anything.

THE COURT: All right. And that is what I was leading to. Anything that could impact our case?

PROSPECTIVE JUROR NUMBER TWO: No, sir.

THE COURT: All right. This is a separate case.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: All right. How about any other issues that involve work, that you haven't mentioned, that have any significance for you?

PROSPECTIVE JUROR NUMBER TWO: As far as -

THE COURT: As far as issues, problems, conflict, anything like that?

PROSPECTIVE JUROR NUMBER TWO: That would pertain to this case?

THE COURT: Well, that would pertain to your work because your work is different than this case.

PROSPECTIVE JUROR NUMBER TWO: Yeah. No.

THE COURT: Do you like being independent?

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: All right. And do you prefer not working for someone else?

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: Other than your customer.

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: All right. And was that a calculated choice you made to become a, if you will, a self-employed carpenter?

PROSPECTIVE JUROR NUMBER TWO: Yes, it was.

THE COURT: All right. Good. Thank you very much. You know the nature of this case. We've described it.

PROSPECTIVE JUROR NUMBER TWO: From what you've described.

THE COURT: Yes. That's all we have is what I've described.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: And so do you have any hesitation, any issues raised by the nature of the case?

PROSPECTIVE JUROR NUMBER TWO: No. Not from what I know.

THE COURT: And is there any reason that you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER TWO: My biggest issue would be I'm self-employed and -

THE COURT: Right.

PROSPECTIVE JUROR NUMBER TWO: --sole --.

THE COURT: Our schedule is going to be essentially a half day schedule. We're going to be in session from approximately 12:45 to 5:15. That's going to be our trial day. We will not be in trial on Mondays. Because I'm required to hear other cases on Monday. So you would have a portion of the day available to you.

PROSPECTIVE JUROR NUMBER TWO: It's a two hour drive.

THE COURT: Understood. Again, I've got to trust and rely on you to tell us what you think you can do.

PROSPECTIVE JUROR NUMBER TWO: This does --this would put me in a financial position as well as lose clients and -

THE COURT: All right. And so you are the sole operator of the business and the only person.

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: So if you don't work, it doesn't get done.

PROSPECTIVE JUROR NUMBER TWO: Absolutely.

THE COURT: All right. We'll get a different case for you to serve on, Mr. Sargent. Call the number after five. We're going to thank and excuse you.

PROSPECTIVE JUROR NUMBER TWO: Okay. After five tonight?

THE COURT: On Friday.

PROSPECTIVE JUROR NUMBER TWO: On Friday.

THE COURT: On Friday.

THE CLERK: April Davis-Brannum.

THE COURT: Good afternoon, Ms. Davis Brannum.

PROSPECTIVE JUROR NUMBER TWO: Hello.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Did any of the questions I've asked raise any issues for you?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Can you give us your background, please? Start with your name, please.

PROSPECTIVE JUROR NUMBER TWO: April Brannum-Davis.

THE COURT: And your general area of residence?

PROSPECTIVE JUROR NUMBER TWO: Sanger.

THE COURT: How long have you been there?

PROSPECTIVE JUROR NUMBER TWO: Nine years.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER TWO: 11th grade. I didn't graduate high school.

THE COURT: All right. Do you have activity or employment outside the home?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: What do you do?

PROSPECTIVE JUROR NUMBER TWO: I work in the fitting room at Wal-Mart.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: And how is your spouse engaged?

PROSPECTIVE JUROR NUMBER TWO: He works at Riley and Sons Well & Pump.

THE COURT: And what is his work?

PROSPECTIVE JUROR NUMBER TWO: He's a helper.

THE COURT: Thank you. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Any experience in the court system?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: How about in the workplace? Have there ever been any disputes, claims, either by you or against you in any employment context?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Have you ever been involved in any other disputes that were beyond the workplace? Where there would be like a complaint filed or somebody files a lawsuit or somebody takes you to arbitration or wants to resolve any kind of dispute. Have you ever been involved in anything like that?

PROSPECTIVE JUROR NUMBER TWO: Yes. In a lawsuit.

THE COURT: What was--just what was the lawsuit about, briefly?

PROSPECTIVE JUROR NUMBER TWO: Driving in an ambulance.

THE COURT: All right. And were you the claimant or the person against whom the lawsuit was brought?

PROSPECTIVE JUROR NUMBER TWO: They brought it to me. They were --it was against me.

THE COURT: All right. And what was it about? Were you somehow involved in the ambulance?

PROSPECTIVE JUROR NUMBER TWO: Yes. They took me to the hospital and they took me to court over that.

THE COURT: I see. And how did that case work out?

PROSPECTIVE JUROR NUMBER TWO: Okay.

THE COURT: It worked out okay?

PROSPECTIVE JUROR NUMBER TWO: Yeah.

THE COURT: Would it have any potential to affect our case?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Good. Any other kinds of issues like that?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Now, in your employment, in the workplace, have there been issues ever that have caused you problems, made a complaint, grievances, anything like that?

PROSPECTIVE JUROR NUMBER TWO: No.

THE CLERK: Can I have you speak up, some of counsel can't hear you. You may want to hold that up a little closer to you.

THE COURT: All right. You know the nature of our case, I've described the nature of this case, have you heard that?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER TWO: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER TWO: No.

THE COURT: Thank you very much, Ms. Davis-Brannum.

Mr. Brooks.

PROSPECTIVE JUROR NUMBER THREE: Yes. My name is Justin Brooks.

THE COURT: General area of residence.

PROSPECTIVE JUROR NUMBER THREE: Right now I just moved to eastern Stockton.

THE COURT: Your educational background?

PROSPECTIVE JUROR NUMBER THREE: Graduated two year college. High school and four years at Cal Poly San Luis Obispo.

THE COURT: And what was your field of study at San Luis Obispo?

PROSPECTIVE JUROR NUMBER THREE: Ag business.

THE COURT: All right. Do you have an education --I'm sorry, an occupation or endeavor? You have an education.

PROSPECTIVE JUROR NUMBER THREE: Yes, I do. I'm a manager/supervisor at Ratto Brothers in Modesto.

THE COURT: What kind of a business is that?

PROSPECTIVE JUROR NUMBER THREE: It's farming row crops.

THE COURT: All right. How many people do you supervise?

PROSPECTIVE JUROR NUMBER THREE: Directly under me, about 20ish.

THE COURT: And what is their work?

PROSPECTIVE JUROR NUMBER THREE: Ranges from transplanting to irrigation, tractor driving, things like that.

THE COURT: Is it primarily field work?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Does the work force speak languages other than English?

PROSPECTIVE JUROR NUMBER THREE: Yes, they do.

THE COURT: Are you able to speak another language?

PROSPECTIVE JUROR NUMBER THREE: Yeah, Spanglish –

THE COURT: All right. Is it enough to get along in the workplace.

PROSPECTIVE JUROR NUMBER THREE: Yes, it is.

THE COURT: Or do you have someone who interprets?

PROSPECTIVE JUROR NUMBER THREE: No, it's enough to get along in the workplace.

THE COURT: And how long have you been doing this?

PROSPECTIVE JUROR NUMBER THREE: About six, six and a half years.

THE COURT: All right. Do you have a spouse?

PROSPECTIVE JUROR NUMBER THREE: Yes, I do.

THE COURT: And what is her activity?

PROSPECTIVE JUROR NUMBER THREE: She works at a radiology place. She takes x-rays, CT and MRI. She's a technician.

THE COURT: Is she like a technician?

PROSPECTIVE JUROR NUMBER THREE: Yes, technician.

THE COURT: Does she have a license?

PROSPECTIVE JUROR NUMBER THREE: Yes, she does.

THE COURT: All right. So she's had schooling and has the license.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Have you ever served on a jury?.

PROSPECTIVE JUROR NUMBER THREE: Yes, I did.

THE COURT: Was it civil or criminal?

PROSPECTIVE JUROR NUMBER THREE: It was criminal.

THE COURT: Was there a verdict?

PROSPECTIVE JUROR NUMBER THREE: Yes, there was.

THE COURT: In the state court?

PROSPECTIVE JUROR NUMBER THREE: Yes. Kern County.

THE COURT: How long ago?

PROSPECTIVE JUROR NUMBER THREE: It's probably been maybe 10 or 12 years.

THE COURT: All right. Is that the only case you were a juror in or did you serve on more than one?

PROSPECTIVE JUROR NUMBER THREE: That's the only case.

THE COURT: All right. Now, putting aside your jury service, do you have other experience with the court system?

PROSPECTIVE JUROR NUMBER THREE: Small things like unemployment, but we didn't come to – you know, we just met like in a little room with the judge.

THE COURT: I see. Was there an agreement then made?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: Did that work out okay?

THE COURT: In other words, you were hoping to get paid a little more?

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER THREE: He was, I guess.

THE COURT: Was that a claim involving an injury or was it just a matter of a wage claim?

PROSPECTIVE JUROR NUMBER THREE: The reason being I was there is I was employed by a different company at the time and I had fired the guy and then that's where we led to.

THE COURT: So then there was an issue over whether or not the employment terminated with cause?

PROSPECTIVE JUROR NUMBER THREE: Yes. That's correct.

THE COURT: All right. And you had to explain why you terminated the employee.

PROSPECTIVE JUROR NUMBER THREE: Yes. I had to bring documentation of different things that I wrote --that I had written him up for.

THE COURT: All right. And in that job, how many people did you supervise?

PROSPECTIVE JUROR NUMBER THREE: Well, quite a --probably 40.

THE COURT: And what kind of work was that?

PROSPECTIVE JUROR NUMBER THREE: That was agricultural harvesting company.

THE COURT: All right. So were they running machines or were they basically hand labor in the field?

PROSPECTIVE JUROR NUMBER THREE: It was a machine harvest, but it was one of my truck drivers.

THE COURT: All right. And you thought you were right.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And did the administrative law judge disagree?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. And so what's your sense of how that came out? Do you think it was a wrong decision or you understand that essentially he saw the case differently?

PROSPECTIVE JUROR NUMBER THREE: I kind of felt that it was wrong because I knew the guy a little bit more than the judge did.

THE COURT: Understood.

PROSPECTIVE JUROR NUMBER THREE: More on a personal level.

THE COURT: All right. And you thought there was very good reason to let him go.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. So is that something that lingers, that still is with you?

PROSPECTIVE JUROR NUMBER THREE: No, I mean, I come in contact with certain situations day-to-day, you know, or not day-to-day, but in my job now. But I don't have a real problem with it, no.

THE COURT: All right. And so is it anything that could impact our case?

PROSPECTIVE JUROR NUMBER THREE: No, I don't believe so.

THE COURT: It's totally separate.

PROSPECTIVE JUROR NUMBER THREE: This is correct.

THE COURT: And you can promise the parties that you wouldn't let it affect our case.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Thank you. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: We went over – it was one case only or more than one?

PROSPECTIVE JUROR NUMBER THREE: Just the one.

THE COURT: Just the one in Kern County.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Let us talk about whether or not you've ever made a claim, whether it was small claims or any other kind of proceeding.

PROSPECTIVE JUROR NUMBER THREE: Yes, I --yes, I made a claim.

THE COURT: What kind of a case was that?

PROSPECTIVE JUROR NUMBER THREE: I was at something at an Elks Club and altercation broke out and I ended up having to go to the hospital. So -

THE COURT: It was a social event?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: And someone injured you?

PROSPECTIVE JUROR NUMBER THREE: Correct.

THE COURT: And then you had to basically try to recover your medical expenses?

PROSPECTIVE JUROR NUMBER THREE: That's correct.

THE COURT: All right. Was a lawsuit filed?

PROSPECTIVE JUROR NUMBER THREE: Yes, there was.

THE COURT: All right. How did it work out?

PROSPECTIVE JUROR NUMBER THREE: It worked out in my favor.

THE COURT: All right. And did you think that was fair?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: In terms of your claim, did you get about what you were asking for, more or less?

PROSPECTIVE JUROR NUMBER THREE: Yes. It covered the expense.

THE COURT: It did cover it. And so do you feel that the outcome was fair?

PROSPECTIVE JUROR NUMBER THREE: Yes, I do.

THE COURT: All right. Any other experiences that involve claims, disputes, that you've had besides what we've gone over?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: That's the extent of it.

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Any other workplace, job issues, for instance, ever been terminated from a job?

PROSPECTIVE JUROR NUMBER THREE: Have I?

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER THREE: No. I have never been terminated.

THE COURT: All right. And has your experience been generally that your workplaces have been fair or not fair?

PROSPECTIVE JUROR NUMBER THREE: The two major jobs I've had, yes, they've been fair.

THE COURT: All right. And in your two major jobs, have you always had a supervisor?

PROSPECTIVE JUROR NUMBER THREE: Actually both times it's actual owner, so I guess that's -

THE COURT: You report to the boss, so to speak?

PROSPECTIVE JUROR NUMBER THREE: Yes, the owner. Both times.

THE COURT: And were they both reasonable individuals or not reasonable?

PROSPECTIVE JUROR NUMBER THREE: Yeah, they're both reasonable.

THE COURT: All right. And so no problems?

PROSPECTIVE JUROR NUMBER THREE: No problems.

THE COURT: Now, you know the kind of this case, the kind of case we have here. You've heard the description of the case.

PROSPECTIVE JUROR NUMBER THREE: Yeah, I heard the description.

THE COURT: All right. Could you hear that kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: Hesitation?

PROSPECTIVE JUROR NUMBER THREE: Yeah, I mean, but I can hear it. I'm a pretty open-minded person.

THE COURT: All right. Well, tell me if there is any, what your hesitation is.

PROSPECTIVE JUROR NUMBER THREE: I think I'm fine with it.

THE COURT: You are?

PROSPECTIVE JUROR NUMBER THREE: Yeah.

THE COURT: Well, if you get instructed on what the law is and what the law permits and doesn't permit, would you be able to follow the law?

PROSPECTIVE JUROR NUMBER THREE: Yes.

THE COURT: All right. Is there anything about the case that you can think of that gives you any cause for concern?

PROSPECTIVE JUROR NUMBER THREE: No.

THE COURT: All right. Is there any reason you'd be unable to serve on our jury?.

PROSPECTIVE JUROR NUMBER THREE: No, there's no real reason.

THE COURT: Thank you very much, Mr. Brooks. We appreciate it.

Ms. Fox.

PROSPECTIVE JUROR NUMBER FOUR: Yes. My name is Sandra K. Fox. I live in southwestern Porterville. And I am retired for 40 years of state service. The first 32 years I was a psychiatric technician, the last eight years I was a teacher. So I have a degree in liberal studies and a teaching --a further year of education to get a teaching credential.

THE COURT: Thank you. Were you at the state hospital?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: You were. And where did you teach?

PROSPECTIVE JUROR NUMBER FOUR: At the state hospital.

THE COURT: Also at the state hospital. Were you teaching patients?

PROSPECTIVE JUROR NUMBER FOUR: I was teaching emotionally disturbed developmentally and disabled adolescents.

THE COURT: All right. Thank you. Do you have a spouse?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: Ask what is his activity?

PROSPECTIVE JUROR NUMBER FOUR: He's a retired antique dealer.

THE COURT: All right. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: How about experience in the court system?

PROSPECTIVE JUROR NUMBER FOUR: I -- 21 years ago when I was a lot younger and more foolish, I was convicted of --or I pled no contender to a --for a DUI.

THE COURT: All right. Do you think that case was fairly handled or not?

PROSPECTIVE JUROR NUMBER FOUR: Oh, yes. I did it.

THE COURT: You did it. Okay. And so it's not a matter of it was an unjustified stop and you were railroaded.

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: All right. And so that case is long over and it --could it have any kind of impact on our case here?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: All right. Good. How about any experience with disputes?

PROSPECTIVE JUROR NUMBER FOUR: You mean like at work?

THE COURT: Whether it's at work --but let's start at work. Yes.

PROSPECTIVE JUROR NUMBER FOUR: No more than like if you work someplace 40 years, you're going to have a little malicious gossip. One time a supervisor prejudged me because of malicious

gossip. But as she got to know me, that --there was never any issues where I was reported or could have lost my job or anything like that.

THE COURT: All right. And did you ever have any complaints that you passed on to someone else about your workplace?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Good. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Any experience besides what you've told us, the one case, with the court system?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: You've never been a witness.

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: How about a victim of a crime?

PROSPECTIVE JUROR NUMBER FOUR: Oh, about 38, 40 years ago, my house was burgled.

THE COURT: Was it ever solved?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Was that frustrating?

PROSPECTIVE JUROR NUMBER FOUR: Yeah. But, you know, I understood.

THE COURT: Did you hold it against law enforcement for not –

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: --jumping right on it and solving the case?

PROSPECTIVE JUROR NUMBER FOUR: And one time I had some checks stolen. But that was resolved. The was apprehended.

THE COURT: They did apprehend the person. All right.

PROSPECTIVE JUROR NUMBER FOUR: Yeah.

THE COURT: Did that cause a lot of inconvenience, were the checks used?

PROSPECTIVE JUROR NUMBER FOUR: No, because actually the first person that he tried to cash a bogus check was someone that knew me.

THE COURT: Knew you. All right. That's unfortunate for him, lucky for you.

PROSPECTIVE JUROR NUMBER FOUR: Yeah.

THE COURT: All right. Good. We've covered anything about your workplace that could have any potential impact on this case. Is there anything?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: You know the nature of our case here.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER FOUR: Yes, I could.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER FOUR: Yes. I have custody of two teenage granddaughters who are abused by my son and their mother. And about three and a half years ago my mother died. She lived with us. And after that, they started having emotional problems and they're both in therapy right now. In fact, the oldest one had to miss an appointment today. She was put on medication about a month ago and she started having to go to therapy because of an attempted suicide attempt and she is close to -

THE COURT: Are you saying you need to be there full time?

PROSPECTIVE JUROR NUMBER FOUR: Yeah. Especially because they get home from school about 3:30 and it would be quite, you know, a long time alone.

THE COURT: All right. I think that is a genuine hardship. We will thank and excuse you from this case. Please call the number after five on Friday.

PROSPECTIVE JUROR NUMBER FOUR: Thank you. I have some documentation of their appointments if you need to see them.

THE COURT: I absolutely trust what you've said.

PROSPECTIVE JUROR NUMBER FOUR: Okay. Thank you.

THE COURT: That won't be necessary.

THE CLERK: Angela Reed.

THE COURT: Good afternoon, Ms. Reed.

PROSPECTIVE JUROR NUMBER FOUR: Good afternoon.

THE COURT: Do you know anything anybody associated with it?

PROSPECTIVE JUROR NUMBER FOUR: No, I don't.

THE COURT: Have any of the questions I've asked caused you any concerns or issues?

PROSPECTIVE JUROR NUMBER FOUR: No, not really.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER FOUR: I am an administrative assistant. And I live in Denair.

THE COURT: Denair. And how long have you been there?

PROSPECTIVE JUROR NUMBER FOUR: Two years.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER FOUR: Some college.

THE COURT: Now, what kind of a business are you an administrative assistant for?

PROSPECTIVE JUROR NUMBER FOUR: Foster Farms.

THE COURT: All right. And is that in a particular division or area of that?

PROSPECTIVE JUROR NUMBER FOUR: The turkey division.

THE COURT: The turkey division. All right. Do you have anybody that works for you?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Do you report directly to a supervisor?

PROSPECTIVE JUROR NUMBER FOUR: Yes, I do.

THE COURT: All right. And do you have levels of supervision above one supervisor or do you essentially interface with one supervisor?

PROSPECTIVE JUROR NUMBER FOUR: Basically one supervisor.

THE COURT: All right. Thank you. You have a spouse?

PROSPECTIVE JUROR NUMBER FOUR: I do.

THE COURT: And what is his endeavor?

PROSPECTIVE JUROR NUMBER FOUR: He is a dispatch supervisor also for Foster Farms in the chicken division.

THE COURT: Thank you. All right. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER FOUR: Yes, I have.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER FOUR: Criminal.

THE COURT: Was there a verdict?

PROSPECTIVE JUROR NUMBER FOUR: Yes, there was.

THE COURT: Was that in the state court?

PROSPECTIVE JUROR NUMBER FOUR: It was in the county, Merced County.

THE COURT: Yes. That's the state court. Thank you. Was it just one case?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: How about any other experience with the court system?

PROSPECTIVE JUROR NUMBER FOUR: Yes. I've had a couple of misdemeanors.

THE COURT: All right. Were those cases, first of all, do you think fair or were they not fair?

PROSPECTIVE JUROR NUMBER FOUR: They were pretty fair.

THE COURT: All right. And how did they work out? Were they satisfactory or unsatisfactory?

PROSPECTIVE JUROR NUMBER FOUR: They were satisfactory.

THE COURT: Do you think you were fairly treated?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: All right. And is that something now that's in the past?

PROSPECTIVE JUROR NUMBER FOUR: It is. Except for that I'm doing --I'm on their AWP program right now. So --for another month.

THE COURT: All right. That wouldn't interfere with jury service?

PROSPECTIVE JUROR NUMBER FOUR: Well, they told me I can't miss more than four days. I don't know if that -

THE COURT: I suspect I could probably write a note and they would -

PROSPECTIVE JUROR NUMBER FOUR: Okay.

THE COURT: That they would let you help us here. All right. Any other issues that would involve – ever been a victim of a crime, a witness, ever testified, anything like that?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: All right. In your workplace, have there ever been disputes or problems that you've been aware of?

PROSPECTIVE JUROR NUMBER FOUR: I used to work for a company that I felt treated me unfairly.

THE COURT: Really? Did you tell someone about it?

PROSPECTIVE JUROR NUMBER FOUR: I did. I filed a lawsuit against them. But then my lawyer died, so I couldn't get anywhere with it. So -

THE COURT: All right. You couldn't handle it yourself?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: And did you look for another lawyer?

PROSPECTIVE JUROR NUMBER FOUR: I did, but I couldn't find anybody that would take my case.

THE COURT: All right. And so it just kind of died too?

PROSPECTIVE JUROR NUMBER FOUR: Yeah, it did.

THE COURT: All right. And did that leave you frustrated?

PROSPECTIVE JUROR NUMBER FOUR: Yes, pretty much for a while.

THE COURT: Does it still bother you?

PROSPECTIVE JUROR NUMBER FOUR: No, not really.

THE COURT: How long ago was it?

PROSPECTIVE JUROR NUMBER FOUR: I would say about maybe 12 years ago.

THE COURT: All right. And without going into the specific details, was this about how you were evaluated? Was it about somebody accusing you of something? Was it about your job performance or something else?

PROSPECTIVE JUROR NUMBER FOUR: It was something else. It was --I just felt like I was treated unfairly.

THE COURT: All right. And how did your employment at that firm end?

PROSPECTIVE JUROR NUMBER FOUR: Actually they fired me.

THE COURT: They did.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: Because you filed the lawsuit.

PROSPECTIVE JUROR NUMBER FOUR: Because -- yes.

THE COURT: All right. So you didn't think that was right?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: And -- but nothing has ever come of it because your lawyer died.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: All right. So what do you think about the potential of that to impact our case?

PROSPECTIVE JUROR NUMBER FOUR: I think I would be more apt to go toward -

THE COURT: To favor?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: To favor the claimants?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: You would.

PROSPECTIVE JUROR NUMBER FOUR: I would.

THE COURT: And so you were -

PROSPECTIVE JUROR NUMBER FOUR: Because I know it does happen.

THE COURT: And so if you were at either table here, you wouldn't be comfortable having someone who thinks as you think judging your rights?

PROSPECTIVE JUROR NUMBER FOUR: If it was me, no.

THE COURT: All right. Well then we're going to thank and excuse you from this case, Ms. Reed. Please call the number after five on Friday.

THE CLERK: Judith Keegan.

PROSPECTIVE JUROR NUMBER ONE: Your Honor.

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER ONE: Am I a chosen juror for this case?

THE COURT: Not yet.

PROSPECTIVE JUROR NUMBER ONE: Because -

THE COURT: That's why you're here though.

PROSPECTIVE JUROR NUMBER ONE: Uh-huh.

THE COURT: It's going to take a little while longer. We have to give everybody a chance to review their backgrounds and to know their thoughts and then the selections will be made.

PROSPECTIVE JUROR NUMBER ONE: Okay.

THE COURT: Thank you.

PROSPECTIVE JUROR NUMBER ONE: You're welcome.

THE COURT: Good afternoon, Ms. Keegan.

PROSPECTIVE JUROR NUMBER FOUR: Hello.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER FOUR: Other than what I heard in the --in here, no.

THE COURT: Good. Do you have, in your background, any experience relative to employment disputes, issues?

PROSPECTIVE JUROR NUMBER FOUR: I have been --we own a business for 50 years. And in 50 years, yes, I have had employees that have gone -- that have, you know, labor relations and -

THE COURT: Right.

PROSPECTIVE JUROR NUMBER FOUR: -- workers' comp and things like that.

THE COURT: All right. So you're a business owner.

PROSPECTIVE JUROR NUMBER FOUR: I am.

THE COURT: And how do you feel about sitting in a case like this?

PROSPECTIVE JUROR NUMBER FOUR: I think I could be fair on it.

THE COURT: Open-minded.

PROSPECTIVE JUROR NUMBER FOUR: I'm not worried about, you know, until I hear what it's -- what's going on.

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER FOUR: I think I could be fair about what's going on.

THE COURT: We just had somebody who told us that she had issues in the workplace and didn't think she could --

PROSPECTIVE JUROR NUMBER FOUR: Uh-huh.

THE COURT: --be open-minded. You've had issues that involve your employees, some of them maybe not so good.

PROSPECTIVE JUROR NUMBER FOUR: Some of them not so good, some of them turned out okay.

THE COURT: Yes. And so you --have you ever dealt with the EEOC?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: How about the department of -- the DFEH, it's called, Department of –

PROSPECTIVE JUROR NUMBER FOUR: -- Labor Relations Commissions and Workers' Comp.

THE COURT: All right. Was that the National Labor Relations Commission?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: It was the state?

PROSPECTIVE JUROR NUMBER FOUR: State.

THE COURT: What was that about?

PROSPECTIVE JUROR NUMBER FOUR: Oh, I had one employee that felt he didn't get paid

enough when he quit and thought he should have gotten more -

THE COURT: It was an wage and hour dispute?

PROSPECTIVE JUROR NUMBER FOUR: -- back pay on his -

THE COURT: All right.

PROSPECTIVE JUROR NUMBER FOUR: On vacation pay.

THE COURT: Understood. How about any claims about like discrimination in the workplace --

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: --because of somebody's gender or their race or anything like that?

PROSPECTIVE JUROR NUMBER FOUR: We had one at one of our stores, one of the girls that worked there said one of the other guys that worked there also was harassing her. It never came to anything because everybody said it was going both ways. So -

THE COURT: All right.

PROSPECTIVE JUROR NUMBER FOUR: So she quit and he moved on and that was it.

THE COURT: That was the end of it.

PROSPECTIVE JUROR NUMBER FOUR: That was the end of it.

THE COURT: They were both gone.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: All right. But that's the only harassment kind of case.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: That your firms have ever had.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: How many stores are there that you own?

PROSPECTIVE JUROR NUMBER FOUR: We own three presently.

THE COURT: Those are auto parts stores?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: And where are they?

PROSPECTIVE JUROR NUMBER FOUR: One's in Merced, one in Atwater and one in Turlock.

THE COURT: All right. Let me now get back to the foundational questions. Have any of the questions I've asked raised any issues for you?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Good. Can you give us your background, your general area of residence?

PROSPECTIVE JUROR NUMBER FOUR: Pardon?.

THE COURT: Your general area of residence.

PROSPECTIVE JUROR NUMBER FOUR: I live in Atwater.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER FOUR: I have some college.

THE COURT: Your --do you --are you still active running the business?

PROSPECTIVE JUROR NUMBER FOUR: Yes, I am.

THE COURT: All right. How long have you been owning the business and running it?

PROSPECTIVE JUROR NUMBER FOUR: I was the original employee in 1959.

THE COURT: All right. Then did you and your husband buy the business?

PROSPECTIVE JUROR NUMBER FOUR: No. My dad started the business when I was in high school and then my husband bought into the business after we were married.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER FOUR: And so we owned part of the business.

THE COURT: So continuously since the 50s?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: All right. And does your husband still work in the business with you?

PROSPECTIVE JUROR NUMBER FOUR: He is officially retired. He does not receive a salary, but yes, he is still active.

THE COURT: He can't stay away.

PROSPECTIVE JUROR NUMBER FOUR: Yes. Exactly.

THE COURT: So he comes to work, but you're not paying him.

PROSPECTIVE JUROR NUMBER FOUR: Yes. That's exactly true.

Exactly.

THE COURT: All right. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER FOUR: Yes. One civil and one criminal. I've been called several times. But only served twice.

THE COURT: All right. And were there verdicts in both of those cases?

PROSPECTIVE JUROR NUMBER FOUR: Yes, there was.

THE COURT: All right. And was that in the state court?

PROSPECTIVE JUROR NUMBER FOUR: It was in county.

THE COURT: Yes. That's the state. Thank you.

PROSPECTIVE JUROR NUMBER FOUR: Right.

THE COURT: Now, putting aside everything we've talked about, how about any other experience in court, like lawsuits, claims, disputes?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Really? Nothing with suppliers, merchandise, products.

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: --being defective?

PROSPECTIVE JUROR NUMBER FOUR: No.

THE COURT: Very good.

PROSPECTIVE JUROR NUMBER FOUR: Yeah, you're right.

THE COURT: For 58 years. Not too many problems. All right. Tell us, if you would, if there's anything that we've missed as far as experiences with issues coming up in the workplace about how the working environment is and how the employees get along. If there's anything else we need to know about.

PROSPECTIVE JUROR NUMBER FOUR: Not really. We have --we have like --we have 24 employees over our three stores. And we have people who have been with us for years and years and years. And then we have other people that come and go.

THE COURT: All right. And do you provide benefits to your employees?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: All right. Any disputes over the benefits ever?

PROSPECTIVE JUROR NUMBER FOUR: No. Never.

THE COURT: All right. Good. You know the nature of this case.

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER FOUR: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER FOUR: No. Not really. I know --

THE COURT: Thank you.

PROSPECTIVE JUROR NUMBER FOUR: -- other people can do my job if I'm not there.

THE COURT: That's right. We appreciate you very much. Thank you. And we're now going to ask Ms. Spycher if she will give us her background.

PROSPECTIVE JUROR NUMBER FIVE: My time is Sheri Spycher and I live in Ballico.

THE COURT: Where is that?

PROSPECTIVE JUROR NUMBER FIVE: It's -- let's see, southeast of Turlock.

THE COURT: All right. Ballico.

PROSPECTIVE JUROR NUMBER FIVE: Yeah, little tiny farming town.

THE COURT: Your education?

PROSPECTVE JUROR NUMBER FIVE: I graduated from high school.

THE COURT: Your activity?

PROSPECTIVE JUROR NUMBER FIVE: I am a homemaker.

THE COURT: All right. Have you ever worked outside the home?

PROSPECTIVE JUROR NUMBER FIVE: 19 years ago, yes.

THE COURT: What kind of work?

PROSPECTIVE JUROR NUMBER FIVE: I was a --I billed for a medical center.

THE COURT: All right. Your spouse?

PROSPECTIVE JUROR NUMBER FIVE: He's a farmer.

THE COURT: Have you ever served on a jury.

PROSPECTIVE JUROR NUMBER FIVE: I've been called twice and I've served once.

THE COURT: All right. Was it civil or criminal?

PROSPECTIVE JUROR NUMBER FIVE: Criminal.

THE COURT: Was there a verdict?

PROSPECTIVE JUROR NUMBER FIVE: Yes.

THE COURT: State court?

PROSPECTIVE JUROR NUMBER FIVE: Yes.

THE COURT: Other experience with the Courts?

PROSPECTIVE JUROR NUMBER FIVE: No.

THE COURT: Never been a victim of a crime?

PROSPECTIVE JUROR NUMBER FIVE: No.

THE COURT: No disputes?

PROSPECTIVE JUROR NUMBER FIVE: No.

THE COURT: In terms of your husband's farming, does

he employ other people?

PROSPECTIVE JUROR NUMBER FIVE: Yes, he does.

THE COURT: Approximately how many?

PROSPECTIVE JUROR NUMBER FIVE: During harvest, there's about 40. Otherwise there's probably 12.

THE COURT: All right. What kind of crops does he farm?

PROSPECTIVE JUROR NUMBER FIVE: Almonds and peaches.

THE COURT: Permanent crops.

PROSPECTIVE JUROR NUMBER FIVE: Yes.

THE COURT: And if you know, has he ever had any employment disputes with his workers?

PROSPECTIVE JUROR NUMBER FIVE: I mean, there's been issues, but I don't –

THE COURT: Like injuries or.

PROSPECTIVE JUROR NUMBER FIVE: Yeah.

THE COURT: Payment for wages.

PROSPECTIVE JUROR NUMBER FIVE: Yeah, but I don't think --I don't think there's been any lawsuits or anything like that.

THE COURT: All right. Nobody making any claims that you knew of?

PROSPECTIVE JUROR NUMBER FIVE: Not that I know of.

THE COURT: All right. Thank you. You know what this case is about.

PROSPECTIVE JUROR NUMBER FIVE: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER FIVE: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER FIVE: No.

THE COURT: Thank you very much, Ms. Spycher.

Ms. Scott.

PROSPECTIVE JUROR NUMBER SIX: My name is Laura Scott. I'm from Los Banos.

THE COURT: You've been there?

PROSPECTIVE JUROR NUMBER SIX: 35 years.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER SIX: I have postgraduate work. I'm a teacher.

THE COURT: On what level?

PROSPECTIVE JUROR NUMBER SIX: I'm teaching first grade.

THE COURT: All right. Are you teaching right now?

PROSPECTIVE JUROR NUMBER SIX: I am.

THE COURT: What would it do to you if you were on this jury as far as your class is concerned?

PROSPECTIVE JUROR NUMBER SIX: Be a very bad thing because I'd have to have lots of substitutes.

THE COURT: You would. Well, we have to leave that up to you. Do you think you could do it?

PROSPECTIVE JUROR NUMBER SIX: I could do it, but it would be very bad for my children.

THE COURT: You'd be distracted?

PROSPECTIVE JUROR NUMBER SIX: Yes. Because I have to go do lesson plans every night.

THE COURT: All right. Well, and it wouldn't work if you were free in the mornings?

PROSPECTIVE JUROR NUMBER SIX: No. Because I live in Los Banos, it takes me an hour and a half to two hours to get here.

THE COURT: All right. Well then, Ms. Scott, we will thank and excuse you from this case. Please call the number after five.

PROSPECTIVE JUROR NUMBER SIX: Thank you.

THE CLERK: Neal Douglas.

THE COURT: Good afternoon, Mr. Douglas.

PROSPECTIVE JUROR NUMBER SIX: Good afternoon.

THE COURT: Do you know anything about our case or anybody associated with it?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Have any of the questions I've asked raised issues for you?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER SIX: I'm retired. I'm retired glazer.

THE COURT: A glazer some.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Is that glass?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Thank you. Your education?

PROSPECTIVE JUROR NUMBER SIX: High school.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Was she ever employed outside the home?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: She's been a homemaker?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER SIX: Yes. Twice.

THE COURT: Civil or criminal?.

PROSPECTIVE JUROR NUMBER SIX: Criminal.

THE COURT: Both?

PROSPECTIVE JUROR NUMBER SIX: Both, yes.

THE COURT: Were there verdicts in both cases?

PROSPECTIVE JUROR NUMBER SIX: One verdict, one was settled before it.

THE COURT: Before you got to deliberate?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. How about other court experience?

PROSPECTIVE JUROR NUMBER SIX: None.

THE COURT: None. No disputes?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: When you were working, did you work with others? Did you supervise anybody?

PROSPECTIVE JUROR NUMBER SIX: Yes, I was the shop foreman.

THE COURT. You were the shop foreman. All right. And then who did you report to?

PROSPECTIVE JUROR NUMBER SIX: Directly to the boss.

THE COURT: The owner of the business?

PROSPECTIVE JUROR NUMBER SIX: Pardon me?

THE COURT: The owner of the business?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. How about any issues in the workplace when you were working?

PROSPECTIVE JUROR NUMBER SIX: Nothing serious. Just normal every day.

THE COURT: Issues like payment of wages and things like that?

PROSPECTIVE JUROR NUMBER SIX: Not a payment, people getting work done and --

THE COURT: Performance?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. And so was it your responsibility to essentially keep track of the performance of those who worked under you?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And then if somebody wasn't doing the job, would you take the action yourself or consult the boss?

PROSPECTIVE JUROR NUMBER SIX: I --we usually tried to work it out ourself. Me and the employer, the worker.

THE COURT: With the worker and not escalate it.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Were there ever any kinds of claims where the EEOC or the DFEH, anything like that, ever got involved?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Nothing --no discrimination or harassment or anything like that?.

PROSPECTIVE JUROR NUMBER SIX: Nothing that went outside the business place.

THE COURT: All right. You have heard the kind of case we have here. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER SIX: Yeah, I think --I think I can.

THE COURT: Some hesitation?

PROSPECTIVE JUROR NUMBER SIX: Some. But -

THE COURT: What is the hesitation about?

PROSPECTIVE JUROR NUMBER SIX: I'm kind of like the gentleman before that I think there's just a lot of lawsuits out there that don't belong here.

THE COURT: All right. Well, that's certainly something that you're very entitled to have as a view. But we won't really know that until we get into the case. And so do you agree that there are cases that have merit?

PROSPECTIVE JUROR NUMBER SIX: Yes. There are cases that have merit. There's a lot that doesn't have any merit.

THE COURT: Right. And there are cases, therefore, that should be in court.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And then there are cases that shouldn't be.

PROSPECTIVE JUROR NUMBER SIX: Correct.

THE COURT: Because as you've said, they don't have merit. Well, in your present state of mind, and with your background and experience, would you be willing to hear a case and decide whether there's merit to it?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: You would.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Recognizing that some cases do have merit.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: All right. So could we say that your mind is open?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Thank you. Is there anything else about the nature of the claim that causes you any concern?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: And whatever the law is, you're willing to follow it?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Good. Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: Thank you very much, Mr. Douglas. Mr. Veldstra.

PROSPECTIVE JUROR NUMBER SEVEN: By name is Albert Veldstra, I live in the Oakdale area. I've lived in that area for --since 1956. I'm currently involved in agriculture. Retired from law enforcement, the Stanislaus County Sheriff's Department. My wife is a registered nurse. I have college education.

THE COURT: You do.

PROSPECTIVE JUROR NUMBER SEVEN: Yes.

THE COURT: Were you a peace officer?

PROSPECTIVE JUROR NUMBER SEVEN: I was.

THE COURT: All right. And now what are you doing in agriculture?

PROSPECTIVE JUROR NUMBER SEVEN: I raise alpacas.

THE COURT: All right. Do you have other people who help you with that?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: All right. You're essentially the operation. You and your wife?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, sir.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: Did you used to testify in court as an officer?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, I did.

THE COURT: Often?

PROSPECTIVE JUROR NUMBER SEVEN: Very often.

THE COURT: Yes. And you know all about the operations of the court system.

PROSPECTIVE JUROR NUMBER SEVEN: Pretty much, yes.

THE COURT: All right. And how about when you were active and working, were there any

workplace issues like union issues, claims, cases that were going on when you were there?

PROSPECTIVE JUROR NUMBER SEVEN: There were issues. However, there was nothing that I was personally involved in.

THE COURT: All right. And what do you think about this kind of a case that's brought to court, do you think that's okay?

PROSPECTIVE JUROR NUMBER SEVEN: Certainly. It's --it's our system and that's why we have this system to determine whether or not there's merits.

THE COURT: All right. Thank you. Have you ever been involved in any claims or claims against you in your work?

PROSPECTIVE JUROR NUMBER SEVEN: Yes. There was a wrongful death lawsuit filed in federal court that was resolved prior to -

THE COURT: All right.

PROSPECTIVE JUROR NUMBER SEVEN: -- trial.

THE COURT: There was no trial?

PROSPECTIVE JUROR NUMBER SEVEN: There was no trial.

THE COURT: All right. And did that involve the use of force in the line of duty?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, it did.

THE COURT: All right. And relative to that case, was your view --let me back up. Was there first a board of review or an analysis done by an internal affairs team?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, sir.

THE COURT: All right. And was the matter found to be justified internally?

PROSPECTIVE JUROR NUMBER SEVEN: It was.

THE COURT: All right. But nonetheless, the lawsuit was filed.

PROSPECTIVE JUROR NUMBER SEVEN: That is correct.

THE COURT: And so did that cause you any kind of hard feelings or anything that has lingered?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: You understand it's an occupational hazard.

PROSPECTIVE JUROR NUMBER SEVEN: It is. It's all a part of it.

THE COURT: And from your standpoint, was the case properly handled?

PROSPECTIVE JUROR NUMBER SEVEN: I think it was, yes.

THE COURT: And did the system work?

PROSPECTIVE JUROR NUMBER SEVEN: I think it did, yes.

THE COURT: All right. Thank you. Is there anything about that case that could spill over into this one?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: Good. Did you have any supervisory authority? Did you -- like were you a field training officer? Did you have other persons who were under your command?

PROSPECTIVE JUROR NUMBER SEVEN: I was a sergeant with the department and as such, yes, I was a field supervisor.

THE COURT: All right. And in your area of command, approximately how many other officers were under your direction?

PROSPECTIVE JUROR NUMBER SEVEN: I supervised about 15 deputies as well as an office staff of approximately seven personnel.

THE COURT: All right. Thank you. Any issues ever arise about your supervision or the interaction with your people, so to speak?

PROSPECTIVE JUROR NUMBER SEVEN: Nothing that wasn't handled on the individual level.

THE COURT: Informally?

PROSPECTIVE JUROR NUMBER SEVEN: Correct.

THE COURT: Nothing got to, for instance, a grievance stage or a complaint stage?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: All right. And was there anything about your workplace that you believe, any issues that ever came up that could impact our case?

PROSPECTIVE JUROR NUMBER SEVEN: No, sir.

THE COURT: And do you feel completely open-minded about this case?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, I do.

THE COURT: Could you hear this kind of a case?

PROSPECTIVE JUROR NUMBER SEVEN: Yes, sir.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER SEVEN: No.

THE COURT: Thank you very much, Mr. Veldstra.

Mr. Stanford.

PROSPECTIVE JUROR NUMBER EIGHT: My name is Gary Stanford. I live in west Merced. Merced County. And I've been there a resident for about 23 and a half years now.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER EIGHT: I received a two year degree associate of science in

electronic technology. 11 years active duty military electronic maintenance related. Currently employed by San Joaquin Valley air pollution control district as an instrument technician. I cover several counties and fix their air pollution equipment that monitors the air.

THE COURT: All right. So you're a monitor with the equipment?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir. Air quality.

THE COURT: Air quality. Yes. Understood.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Our data is reported to the state, California State Air Resources Board and the EPA.

THE COURT: All right. And what was your rank when you separated from the military?

PROSPECTIVE JUROR NUMBER EIGHT: I was E 5 staff sergeant. Over 11 years active duty.

THE COURT: And did you have people under your command?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, at any given time I had eight or nine subordinate technicians.

THE COURT: All right. Would that be a squad or was it some other designation?

PROSPECTIVE JUROR NUMBER EIGHT: No, it wasn't a squad or anything like that. We were in air traffic control maintenance.

THE COURT: So you were doing technical work and you had people that you supervised.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, that's correct.

THE COURT: All right. Thank you. Do you have a spouse?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, I do.

THE COURT: And does she have any activity outside the home?

PROSPECTIVE JUROR NUMBER EIGHT: No, sir, she's a homemaker.

THE COURT: Has always been a homemaker?

PROSPECTIVE JUROR NUMBER EIGHT: No, sir. She did almost 20 years in major insurance company. And she did numerous jobs. She did assigned risk, which is a high risk insured. She also did office services where she supported human resources for their computers and vehicles and so on and so forth. She did automotive claims for a while. Claims adjuster. And just numerous things.

THE COURT: All right. So she's had a very extensive exposure in the insurance field.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, she has.

THE COURT: Were there ever any issues in her workplace?

PROSPECTIVE JUROR NUMBER EIGHT: Nothing that wasn't resolved at any given time until

she got ready to leave early, I should say they let her go.

THE COURT: Involuntarily?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, there was an issue with that after 19 and a half years.

THE COURT: All right. How did that come about?

PROSPECTIVE JUROR NUMBER EIGHT: Well, they basically said she was a poor performer and let her go. And -

THE COURT: All right.

PROSPECTIVE JUROR NUMBER EIGHT: There was little bit of bitterness on my wife's behalf.

THE COURT: Based on your wife's evaluation of her situation, did she think that was true?

PROSPECTIVE JUROR NUMBER EIGHT: No, she thought it was very unfair.

THE COURT: It was unfair. Did she take any action as a result of that?

PROSPECTIVE JUROR NUMBER EIGHT: No. Not at this point. I say not at this point because this particular employer had been --had class action lawsuits filed against him in different federal courts and they were found to be in judgment on behalf of the plaintiff. In other words, the employee who had sued the company more than once satisfactorily. And -

THE COURT: Was this with regard to down sizing?

PROSPECTIVE JUROR NUMBER EIGHT: No. This was --one of the lawsuits in particular was in regards to not paying over time. They owed all through the '90s.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER EIGHT: It was a huge lawsuit.

THE COURT: Were there any other issues for your wife besides the layoff?

PROSPECTIVE JUROR NUMBER EIGHT: No. No.

THE COURT: Or the termination.

PROSPECTIVE JUROR NUMBER EIGHT: No. She just felt after that many years that she shouldn't have been let go. But that's --I mean, we're beyond that now.

THE COURT: All right. Is there still a possibility she may file a claim?

PROSPECTIVE JUROR NUMBER EIGHT: There's a possibility it may turn into a claim. There's a possibility it may turn into more than just one single claim.

THE COURT: How do you feel about that having a potential to impact this case?

PROSPECTIVE JUROR NUMBER EIGHT: Have no bearing at all on this case.

THE COURT: Your wife's case. No, it doesn't. I agree. But I'm sure that our parties want to be assured of that, that it would be kept completely separate.

PROSPECTIVE JUROR NUMBER EIGHT: Well, my wife, although of course I love my wife, her life is her life and my life is my life and what I'm --

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER EIGHT: -- employed with somebody everything is between me and my employer. When she's employed with somebody, it's between her and her employer.

THE COURT: All right. Thank you very much. And with your employers, have there ever been any comparable issues?

PROSPECTIVE JUROR NUMBER EIGHT: No, nothing that wasn't taken care of internally.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER EIGHT: I mean that was escalated that I recall.

THE COURT: Could you say that your experience has been essentially that you've been fairly treated by your employers?

PROSPECTIVE JUROR NUMBER EIGHT: Oh, yes, sir.

THE COURT: All right. So you don't have any issues of your own?

PROSPECTIVE JUROR NUMBER EIGHT: No, sir.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir. Several times.

THE COURT: Civil and criminal?

PROSPECTIVE JUROR NUMBER EIGHT: All criminal.

THE COURT: All criminal.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

THE COURT: Were there verdicts?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir, every time.

THE COURT: In all cases?

PROSPECTIVE JUROR NUMBER EIGHT: All cases.

THE COURT: Were they in the state court?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

THE COURT: Any other court experience?

PROSPECTIVE JUROR NUMBER EIGHT: I had a --filed a personal injury lawsuit about 1996 or 1997. It all went the way to a court date to appear and we settled out of court.

THE COURT: On the courthouse steps?

PROSPECTIVE JUROR NUMBER EIGHT: Pretty much.

THE COURT: Just before trial.

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

THE COURT: All right. And how did that work out? Was it to your view a fair settlement or not?

PROSPECTIVE JUROR NUMBER EIGHT: It was fair.

THE COURT: All right. So how did the legal system work while you were in the process of your suit?

PROSPECTIVE JUROR NUMBER EIGHT: Well, Your Honor, to be honest with you, it was kind of slow. But -

THE COURT: Slow.

PROSPECTIVE JUROR NUMBER EIGHT: But I expected that.

THE COURT: Why am I not surprised. Well, you did expect it. And it took so much time. But ultimately, everything would you say worked out okay?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

THE COURT: Good. Now, have we covered all the workplace issues and employment issues that you've experienced?

PROSECTIVE JUROR NUMBER EIGHT: Yes, sir. As far as I can recollect, yes, sir.

THE COURT: All right. Well, that's what we want to be sure. And if --if you're sitting here, whether you're at the plaintiff's table or whether you're at the defendant's table, with someone in your present state of mind given your history and

background, are you comfortable having that person judge your rights?

PROSPECTIVE JUROR NUMBER EIGHT: Yes, sir.

THE COURT: Good. Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER EIGHT: No, sir.

THE COURT: Thank you very much, Mr. Stanford.

Mr. Garrett.

PROSPECTIVE JUROR NUMBER NINE: My name is Joel Garrett. I been in Clovis, I have for the last 18 years. I'm two years of college. I'm a salesman. I sell products used in the water industry.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER NINE: Couple years of college.

THE COURT: How about a spouse, do you have a spouse?

PROSPECTIVE JUROR NUMBER NINE: My wife right now is a homemaker in the past she was a teacher's aid for Fresno Unified. Before that for the hospital.

THE COURT: Thank you. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER NINE: Once before in Fresno county. I was on a jury, but they reached a -

THE REPORTER: I'm sorry. I can't hear you.

PROSPECTIVE JUROR NUMBER NINE: Yeah, in Fresno County, it was a criminal case, but they reached a deal before they -

THE COURT: All right. It was settled so you never got to deliberate.

PROSPECTIVE JUROR NUMBER NINE: Correct.

THE COURT: All right. How about other court experience, putting aside jury service?

PROSPECTIVE JUROR NUMBER NINE: None whatsoever.

THE COURT: None?

PROSPECTIVE JUROR NUMBER NINE: Huh-uh.

THE COURT: Involved in any disputes?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Ever been sued?

PROSPECTIVE JUROR NUMBER NINE: No. Not yet.

THE COURT: Any real bad traffic tickets?

PROSPECTIVE JUROR NUMBER NINE: Real bad what?

THE COURT: Traffic tickets?

PROSPECTIVE JUROR NUMBER NINE: I once tried to fight a speeding ticket, but to no avail.

THE COURT: All right. To no avail. Do you think you were fairly treated or did the judge say that there wasn't time to hear you?

PROSPECTIVE JUROR NUMBER NINE: I wasn't really happy with the way the system worked in another county. I just couldn't take the time to take it to the next step, so I paid the ticket.

THE COURT: All right. Understood. Here, of course, you'll be a part of the system, participating as a juror. And so would you keep that separate and let this case go forward on its own merits?

PROSPECTIVE JUROR NUMBER NINE: Sure.

THE COURT: Good. Now, how about workplace issues? Complaints, do you supervise anybody?

PROSPECTIVE JUROR NUMBER NINE: Not really.

THE COURT: All right. Do you have a supervisor?

PROSPECTIVE JUROR NUMBER NINE: I guess you could call it that, but yeah, I'm pretty much on my own.

THE COURT: You are. So have there been any workplace issues?

PROSPECTIVE JUROR NUMBER NINE: Not really.

THE COURT: Any kind of at your company, ever any kind of claims against the company for any kind of activities that would be said to violate the law?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: You know the nature of this case. You've heard about the claims. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER NINE: I think so.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER NINE: Well, possibly. I was kind of ignorant when I got the jury notice about how much time was involved in something like this. I thought --honestly I thought it was Fresno County and you call up and you spend a week calling on the phone. I have a lot of work commitments for the next 60 days. Is there any way I can postpone like calling next Friday, I don't know if I would just have to go through this whole same thing next week as opposed to just postponing my whole service for a few months. Is that something that is possible?

THE COURT: Well, if you are genuinely unavailable because of your work commitments, I believe that your service could be postponed for a reasonable period of time. You would work that out with our jury commissioner.

PROSPECTIVE JUROR NUMBER NINE: That would be great if I could do that.

THE COURT: All right. Then I'll thank and excuse you from this case, Mr. Garrett. We don't want you to be distracted. We need for our jurors to

be able to pay attention in this case. Just hand that to Mr. Stanford, we're going to get someone else in your seat.

PROSPECTIVE JUROR NUMBER NINE: Thank you.

THE CLERK: Tina Lucas.

PROSPECTIVE JUROR NUMBER NINE: Do I still call on Friday?

THE COURT: Talk to Ms. Mabe.

Good afternoon, Ms. Lucas.

PROSPECTIVE JUROR NUMBER NINE: Hi.

THE COURT: Have you heard all the questions?

PROSPECTIVE JUROR NUMBER NINE: Yes.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Have any of the questions I've asked raised any issues for you?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER NINE: I am from Oakdale, California. I am employed at a photography studio. I'm the manager. And my husband is an assistant principal at Modesto School District.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER NINE: Some college.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Experience with the court system?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Any disputes?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: How about issues in the workplace?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Do you supervise anyone?

PROSPECTIVE JUROR NUMBER NINE: Yes.

THE COURT: How many people?

PROSPECTIVE JUROR NUMBER NINE: Eight employees.

THE COURT: Do they ever create issues for you?

PROSPECTIVE JUROR NUMBER NINE: Not anything major.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER NINE: Except being late.

THE COURT: Have there been any claims like against your employer for discrimination or for unfair treatment in the workplace or denial of employment rights?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Listening to the discussion that we've been having with prospective jurors, was there anything that was mentioned that caught your attention as applying to you that you'd want us to know about?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Do you feel you could hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER NINE: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER NINE: No.

THE COURT: Thank you very much, Ms. Lucas. Now we're going to pass the mike down to Mr. Braden.

PROSPECTIVE JUROR NUMBER EIGHTEEN: My name is Jacqueline Geisler.

THE COURT: We're going --if you could pass the mike down, we're going to go down to Mr. Braden. Thank you. We appreciate your help. Thank you. Mr. Braden.

PROSPECTIVE JUROR NUMBER TEN: Stanley Braden. I live near Hughson. Out in the country.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER TEN: Married. Education, two years of college. Six year apprenticeship.

THE COURT: In what kind of field?

PROSPECTIVE JUROR NUMBER TEN: Tool and die maker.

THE COURT: All right. Your work?

PROSPECTIVE JUROR NUMBER TEN: I worked for G 3, which is part of Gallo for 27 and a half years. Now retired.

THE COURT: Your wife?

PROSPECTIVE JUROR NUMBER TEN: My wife is retired and she was a school teacher.

THE COURT: Did you supervise people when you were working?

PROSPECTIVE JUROR NUMBER TEN: Yes, I did.

THE COURT: And did you report to a supervisor?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Any workplace issues?

PROSPECTIVE JUROR NUMBER TEN: Yes. Some.

THE COURT: All right. What was the nature of the issues?

PROSPECTIVE JUROR NUMBER TEN: Mainly union type issues.

THE COURT: All right. Hour and wage, conditions of employment, anything else?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: Were there times when you thought you were being treated unfairly in the workplace?

PROSPECTIVE JUROR NUMBER TEN: Not myself, no.

THE COURT: All right. Were others treated unfairly?

PROSPECTIVE JUROR NUMBER TEN: Not really.

THE COURT: What kind of employment issues were there?

PROSPECTIVE JUROR NUMBER TEN: People getting their tasks done.

THE COURT: In other words, people were not productive enough?

PROSPECTIVE JUROR NUMBER TEN: Right.

THE COURT: Would that affect your responsibilities?

PROSPECTIVE JUROR NUMBER TEN: Yes, it would, as a working supervisor.

THE COURT: All right. And what would you then have to do?

PROSPECTIVE JUROR NUMBER TEN: Report to the plant manager.

THE COURT: Would you ever counsel with the employees who you worked over?

PROSPECTIVE JUROR NUMBER TEN: Usually worked things out amongst us before reporting.

THE COURT: You had --that was the last resort?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Did any claims ever arise where the issues got formalized?

PROSPECTIVE JUROR NUMBER TEN: There was one issue with a woman employee that was a supervisor management personnel in the plant, that she actually filed a suit against the company.

THE COURT: Do you remember why? What the issue was?

PROSPECTIVE JUROR NUMBER TEN: Because she did not advance in her position.

THE COURT: I see. It -

PROSPECTIVE JUROR NUMBER TEN: And I --for some reason I was in depositions for like a day and a half.

THE COURT: You were.

PROSPECTIVE JUROR NUMBER TEN: Yeah.

THE COURT: Did you work with her?

PROSPECTIVE JUROR NUMBER TEN: I did not work directly for her, but witnessed things that she did.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TEN: I was basically there for the company.

THE COURT: All right. And what was the --her claim about why she didn't advance?

PROSPECTIVE JUROR NUMBER TEN: She felt like she should have been made general manager. She worked there 40 some years and she

felt like she should have been advanced. But I don't think there was a person there that liked her.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TEN: And it's --the way it worked out, she ended up dying before the trial ever got--so -

THE COURT: I hope not because of the case

PROSPECTIVE JUROR NUMBER TEN: I don't think it was related to the case, no. She died of a heart attack. Stress, I'm sure.

THE COURT: All right. And was she claiming that her gender was the reason she wasn't made the general manager?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: All right. Were there any other issues

besides that? That were raised in her case?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: All right. Any other issues in the workplace besides that one?

PROSPECTIVE JUROR NUMBER TEN: Just minor things, nothing.

THE COURT: Nothing major?

PROSPECTIVE JUROR NUMBER TEN: Nothing major.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER TEN: Criminal.

THE COURT: Verdict?

PROSPECTIVE JUROR NUMBER TEN: State. And it was --the verdict, yes, there was a verdict.

THE COURT: There was a verdict.

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: All right. Only one case?

PROSPECTIVE JUROR NUMBER TEN: Yes. And it was way back in 1976.

THE COURT: All right. How about other court experience?

PROSPECTIVE JUROR NUMBER TEN: Other than a depositions, nothing.

THE COURT: All right. And those were all were they all related to the one same lawsuit?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Any involvement in disputes, claims, either made by you or against you?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: Anything else that would arise out of your workplace that could potentially impact this case?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: How do you feel about your ability to be fair and open-minded in this case as a juror?

PROSPECTIVE JUROR NUMBER TEN: I have a hard time with so many lawsuits coming to court and wasting our money.

THE COURT: All right. Do you agree or disagree that some lawsuits have merit?

PROSPECTIVE JUROR NUMBER TEN: I agree some do have, a lot of them don't.

THE COURT: All right. Do you know whether this one has merit?

PROSPECTIVE JUROR NUMBER TEN: I'm not sure.

THE COURT: Would you agree that it would be hard to know since we haven't received any evidence?

PROSPECTIVE JUROR NUMBER TEN: It would be hard to know at this point.

THE COURT: All right. And the fact that these claims are made, is that disturbing to you?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Why is that?

PROSPECTIVE JUROR NUMBER TEN: I have a brother that's involved in a big farming operation and I do know that sometimes employees create a lot of problems.

THE COURT: I see. And so in this case, the plaintiffs would have to do more to persuade you?

PROSPECTIVE JUROR NUMBER TEN: Probably.

THE COURT: All right. Well, let's get a different case for you to serve on, Mr. Braden. If you would call the number after five on Friday, we're going to thank and excuse you.

PROSPECTIVE JUROR NUMBER TEN: Thank you.

THE COURT: And thank you for your honesty.

THE CLERK: Susan Ginise, G-I-N-I-S-E.

THE COURT: Is it Ginise?

PROSPECTIVE JUROR NUMBER TEN: It's Ginise.

THE COURT: All right. Good afternoon, Ms. Ginise. Have you heard my questions?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: Any questions raised any issues for you?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: Give us your background, please.

PROSPECTIVE JUROR NUMBER TEN: I live --my name is Susan Ginise. I live in Clovis, California. I've lived there for about six years. Before that, I lived in Fresno for probably 30. I have a little --liberal arts degree from Fresno City College and I attended Fresno State for about a year, year and a half. I have four children, all married and all gone.

THE COURT: All right. Do you have a spouse?

PROSPECTIVE JUROR NUMBER TEN: No. I'm divorced. I'm sorry.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: How about any experience with the court system?

PROSPECTIVE JUROR NUMBER TEN: I was in a petition for --my father died and left a ranch to four of us children.

THE COURT: All right. So there were issues with the probate?

PROSPECTIVE JUROR NUMBER TEN: Yeah. And it was filed, but it never --it was settled out of court.

THE COURT: It was settled out of court.

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: So there was a dispute that started but then it was resolved.

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Anything about that that could impact our case?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: Have you had employment outside the home?

PROSPECTIVE JUROR NUMBER TEN: No. Mainly I've just volunteered because I have, like I say, four children and there's quite an age difference. There's three boys and then ten years and then my daughter. And she had quite a few medical problems.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TEN: So I've just done a lot of volunteer work. I volunteered for Fresno State in the Bulldogs Association, the women, and California Bowl Board and just things like that. Now I volunteer at St. Agnes Gift Shop.

THE COURT: All right. Thank you. Have you ever encountered in any of those activities any workplace kind of disputes? Employment issues?

PROSPECTIVE JUROR NUMBER TEN: No.

THE COURT: None? All right.

PROSPECTIVE JUROR NUMBER TEN: Huh-uh.

THE COURT: Is anything in your background, is there anything that could impact on listening to this case with an open mind?

PROSPECTIVE JUROR NUMBER TEN: No. I don't think so.

THE COURT: You've heard the nature of the claims in this case. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER TEN: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER TEN: Not that I know of, no.

THE COURT: Good. Thank you very much, Ms. Ginise. Mr. Wilson.

PROSPECTIVE JUROR NUMBER ELEVEN: Lee Wilson.

THE COURT: General area of residence?

PROSPECTIVE JUROR NUMBER ELEVEN: Los Banos.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER ELEVEN: High school and a technical school.

THE COURT: How long have you been in Los Banos?

PROSPECTIVE JUROR NUMBER ELEVEN: Nine years.

THE COURT: And what kind of technical school?

PROSPECTIVE JUROR NUMBER ELEVEN: Mechanics.

THE COURT: All right. Do you have an activity or occupation?

PROSPECTIVE JUROR NUMBER ELEVEN: I'm a mechanic.

THE COURT: All right. What kind of mechanic?

PROSPECTIVE JUROR NUMBER ELEVEN: Trucks.

THE COURT: All right. In your workplace, do you supervise anyone?

PROSPECTIVE JUROR NUMBER ELEVEN: I have.

THE COURT: All right. And do you report to a supervisor?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: All right. Any issues in your workplace that arisen?

PROSPECTIVE JUROR NUMBER ELEVEN: There was a few just other employees, you know, I was thinking that was unfair that I got promoted over them. But it was resolved.

THE COURT: Without any formal proceedings?

PROSPECTIVE JUROR NUMBER ELEVEN: Right.

THE COURT: There was never a lawsuit?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Did anyone claim that you were promoted on something other than merit that because -

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: What was the claim?

PROSPECTIVE JUROR NUMBER ELEVEN: Well, they thought it was race.

THE COURT: All right. And were there ever any,like, investigations by the EEOC or the DFEH?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Were there ever statements taken by the employer?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: There was an investigation done?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Does your business have a human resources department?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: And did the human resources department look into these claims?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: And your statement was taken?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Was there ever a hearing of any kind?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: How was it resolved?

PROSPECTIVE JUROR NUMBER ELEVEN: It just was found would no merit and that was it.

THE COURT: Was the determination made that you had earned the promotion?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: And that you had the level of competence that justified it?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: All right. Now, what about that dispute, was that something that was disturbing to you?

PROSPECTIVE JUROR NUMBER ELEVEN: A little bit. A little bit.

THE COURT: You understand how people can do that?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: You didn't think that it had any merit.

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Did it --did it turn out all right?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Do you think it was fairly handled?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Do you think it could have any application to our case?

PROSPECTIVE JUROR NUMBER ELEVEN: No. I don't think so.

THE COURT: It's completely a different case.

PROSPECTIVE JUROR NUMBER ELEVEN: Right.

THE COURT: And you would keep it different.

PROSPECTIVE JUROR NUMBER ELEVEN: Right.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER ELEVEN: Separated.

THE COURT: Before your separation, what did your spouse do?

PROSPECTIVE JUROR NUMBER ELEVEN: Teacher.

THE COURT: Is she still a teacher?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Do you have any experience with the court system?

PROSPECTIVE JUROR NUMBER ELEVEN: Just divorce court.

THE COURT: Okay. That we won't go there. Any other issues, employment issues in the workplace that you've ever encountered and we haven't talked about?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: And you're confident that you'd keep your experience separate from this case?

PROSPECTIVE JUROR NUMBER ELEVEN: Mostly, yeah.

THE COURT: All right. Well, would there be any reason to relate it?

PROSPECTIVE JUROR NUMBER ELEVEN: Sounds like it was kind of the same situation. A little.

THE COURT: Well, of course, we don't know. In this case, we're talking about people whose jobs ended.

PROSPECTIVE JUROR NUMBER ELEVEN: Oh, correct. Correct.

THE COURT: And allegedly having to do with their national origin.

PROSPECTIVE JUROR NUMBER ELEVEN: Right.

THE COURT: And so it's really not the same case. So is your view that the plaintiffs in this case would have to do more to persuade you?

PROSPECTIVE JUROR NUMBER ELEVEN: More than?

THE COURT: Than the employer.

PROSPECTIVE JUROR NUMBER ELEVEN: A little more, yeah.

THE COURT: All right. Well, I'll tell you what. We're going to get a live case for you to serve on because each party should be on the same level

playing field. In one's a little bit ahead or behind, then we don't want to have that.

PROSPECTIVE JUROR NUMBER ELEVEN: Sure.

THE COURT: Okay. Thank you for being honest. Call the number after five on Friday.

THE CLERK: Christina Gorell.

THE COURT: Good afternoon, Ms. Gorell.

PROSPECTIVE JUROR NUMBER ELEVEN: Good afternoon, sir.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER ELEVEN: No, sir.

THE COURT: Have my questions created any issues for you?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER ELEVEN: High school graduate. Filipino.

THE COURT: General area of residence?

PROSPECTIVE JUROR NUMBER ELEVEN: Hanford, California.

THE COURT: Your activity or employment?

PROSPECTIVE JUROR NUMBER ELEVEN: Palace Indian gaming casino.

THE COURT: What kind of work do you do there?

PROSPECTIVE JUROR NUMBER ELEVEN: Gift shop clerk.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER ELEVEN: Divorce.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Any experience with the court system?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Ever been involved in any disputes?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: No claims against you?

PROSPECTIVE JUROR NUMBER ELEVEN: No, sir.

THE COURT: You've never made any claims?

PROSPECTIVE JUROR NUMBER ELEVEN: No, sir.

THE COURT: How about any issues in the workplace, have you ever had workplace issues?

PROSPECTIVE JUROR NUMBER ELEVEN: None.

THE COURT: Do you believe you've been fairly treated in your employments?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes, sir.

THE COURT: Have you ever observed others in the workplace who you thought were not being fairly treated?

PROSPECTIVE JUROR NUMBER ELEVEN: No, sir.

THE COURT: You know the nature of our case. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes, sir.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes. I working every day. I'm paying rent. My own place. And I have my two kids with me.

THE COURT: All right. You will not be paid for jury service?

PROSPECTIVE JUROR NUMBER ELEVEN: Just only one day.

THE COURT: Only one day.

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: And is your employment during the day or in the evening?

PROSPECTIVE JUROR NUMBER ELEVEN: Day.

THE COURT: The day. All right. We're going to thank you and excuse you, Ms. Gorell. Pleae call the number after five on Friday.

THE CLERK: Audrey Hyer.

THE COURT: Good afternoon, Ms. Hyer.

PROSPECTIVE JUROR NUMBER ELEVEN: Hi.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER ELEVEN: No, I don't.

THE COURT: Have my questions raised any issues for you?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: Can you give us your background, please?

PROSPECTIVE JUROR NUMBER ELEVEN: I've been a stay at home mom. I went back to work about a year and a half ago. And I have a little bit of college. I live in Modesto.

THE COURT: What kind of work do you do?

PROSPECTIVE JUROR NUMBER ELEVEN: I'm a bank teller.

THE COURT: And what does your husband do?

PROSPECTIVE JUROR NUMBER ELEVEN: He works for the State of California at Department of Water Resources at Santa Nella.

THE COURT: Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER ELEVEN: Uh-huh, twice.

THE COURT: Civil or criminal?

PROSPECTIVE JUROR NUMBER ELEVEN: Civil and both times came up with a verdict.

THE COURT: Verdicts. All right. Good. How about other court experience?

PROSPECTIVE JUROR NUMBER ELEVEN: We had a couple of burglaries and the lady basically, my kids identified and so I pushed it all the way to put her away.

THE COURT: All right. And there was actually a conviction?

PROSPECTIVE JUROR NUMBER ELEVEN: Oh, yeah.

THE COURT: All right. Any other --ever been involved in disputes, somebody made a claim against you, you made a claim against a business or anybody?

PROSPECTIVE JUROR NUMBER ELEVEN: No.

THE COURT: All right. How about issues in the workplace? Have you ever been on a job where there have been problems?

PROSPECTIVE JUROR NUMBER ELEVEN: No, I've only basically worked a year and a half, so –

THE COURT: All right.

PROSPECTIVE JUROR NUMBER ELEVEN: I have a great boss.

THE COURT: Good. You've heard the nature of our case. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER ELEVEN: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER ELEVEN: Only vacations, that's it. So not that we're flying anywhere, but I do have relatives coming for a full week during Thanksgiving. And then we were going to be gone for four days at the end of October. But nothing that is out-of-pocket for me. Only for the family coming in.

THE COURT: All right. Well, since you'll be here half the day, do you think we could work around that?

PROSPECTIVE JUROR NUMBER ELEVEN: I guess. You know. Since it's Thanksgiving, I don't know what your schedule would be.

THE COURT: Well, we won't be, obviously, on Thursday and Friday we will not be in session. And depending upon what our schedule is, I can't say for sure. Probably the three days, the Monday, Tuesday

and Wednesday, but we won't know yet until we get closer.

PROSPECTIVE JUROR NUMBER ELEVEN: Okay.

THE COURT: All right. Yes.

PROSPECTIVE JUROR NUMBER ONE: Your Honor.

THE COURT: Mr. Galvan.

PROSPECTIVE JUROR NUMBER ONE: This, I believe, if I'm getting this right, we're going to be here by Thanksgiving.

THE COURT: I'm not certain of that.

PROSPECTIVE JUROR NUMBER ONE: From the schedule as far as what it shows, I believe it's December 5th or so.

THE COURT: That's a possibility.

PROSPECTIVE JUROR NUMBER ONE: Okay. I have a scheduled trip to Seattle as well with the family. Now that I was thinking about as soon as she said Thanksgiving. We are leaving to Seattle for about a week and a half.

THE COURT: All right. When is that?

PROSPECTIVE JUROR NUMBER ONE: That's in Thanksgiving.

THE COURT: All right. Well, out of an abundance of caution, Mr. Galvan, we don't want there to be a conflict. And so we'll thank and excuse you. Call the number after five on Friday.

PROSPECTIVE JUROR NUMBER ONE: Okay. Thank you.

THE CLERK: Robert Paul.

THE COURT: Good afternoon, Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: Good afternoon.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER ONE: No, I don't.

THE COURT: Any issues raised by my questions

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Could you give us your background please?

PROSPECTIVE JUROR NUMBER ONE: Yes. I'm an aircraft artisan. I work down at the naval air station. I'm also retired after 28 years active duty from the Navy. I'm married. My wife works at the high school as a cook. And I've lived in Lemoore for 25 years.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER ONE: And I have two years college.

THE COURT: Two years of college. And what was your rank on separation or retirement?

PROSPECTIVE JUROR NUMBER ONE: I was a senior chief or an E8.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER ONE: Yes, I have.

THE COURT: Criminal or civil?

PROSPECTIVE JUROR NUMBER ONE: Civil.

THE COURT: Was there a verdict?

PROSPECTIVE JUROR NUMBER ONE: Yes, there was.

THE COURT: Was it in the state court?

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: How about other court experience?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: How about --you supervise people.

PROSPECTIVE JUROR NUMBER ONE: Yes.

THE COURT: Any issues in the workplace?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: You've heard the kinds of things we've been talking about relative to the claims made in this case. Any issues there for you?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER ONE: Yes, I could.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER ONE: No.

THE COURT: Thank you very much, Mr. Paul. Now we're going to go down to Ms. Marchbanks.

PROSPECTIVE JUROR NUMBER TWELVE: Nancy Marchbanks. Retired from CSU Stanislaus as an administrative coordinator. Worked there 31 is years. Divorced. Some college courses.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER TWELVE: Yes, I have. Criminal. Three cases. All resolved.

THE COURT: All verdicts?

PROSPECTIVE JUROR NUMBER TWELVE: Yes.

THE COURT: Thank you. How about other court experience?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: Issues in the workplace?

PROSPECTIVE JUROR NUMBER TWELVE: In the 70s I had a letter put in my file. Did you need to know what that was about or -

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TWELVE: Just in my human resource file. No big deal. No suit. I just used the phone for personal phone -

THE COURT: All right. And so that was an alleged violation of a workplace rule?

PROSPECTIVE JUROR NUMBER TWELVE: Right.

THE COURT: All right. But it never went anywhere?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: And that was the end of it?

PROSPECTIVE JUROR NUMBER TWELVE: Right. I was guilty, I stopped doing it.

THE COURT: Okay. Could it have any impact in our case?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: Have you ever been in court on other matters other than jury service?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: Involved in any disputes?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: Claimant? Victim? Anything like that?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: How about any other issues in the workplace, were there ever any lawsuits while you were there about employment or the employees?

PROSPECTIVE JUROR NUMBER TWELVE: No, not in my area.

THE COURT: In other areas?

PROSPECTIVE JUROR NUMBER TWELVE: On campus, you know, at the university, there was always some. But not -

THE COURT: Always something going on in a university.

PROSPECTIVE JUROR NUMBER TWELVE: Right.

THE COURT: But it did not affect you?

PROSPECTIVE JUROR NUMBER TWELVE: Did not affect me.

THE COURT: Were they issues that you were in touch with?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: You know the nature of this case, the claims. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER TWELVE: Yes.

THE COURT: Is there any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER TWELVE: No.

THE COURT: Thank you very much, Ms. Marchbanks. Ms. Tweedy.

PROSPECTIVE JUROR NUMBER THIRTEEN: Jennifer Tweedy. I live in Fowler for the past five years. I'm postgraduate from Fresno

State. I'm currently a high school ag teacher. I'm married. My husband is a diesel mechanic.

THE COURT: Are you in school right now?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes I'm supposed to be at the Fresno Fair.

THE COURT: Can you get a substitute?

PROSPECTIVE JUROR NUMBER THIRTEEN: I have a substitute.

THE COURT: Would you be able to serve on our jury?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: All right. Have you ever served as a juror?

PROSPECTIVE JUROR NUMBER THIRTEEN: No.

THE COURT: How about experience with the court system?

PROSPECTIVE JUROR NUMBER THIRTEEN: No. Any disputes in the workplace?

PROSPECTIVE JUROR NUMBER THIRTEEN: Gender discrimination.

THE COURT: All right. And how was that handled?

PROSPECTIVE JUROR NUMBER THIRTEEN: It was my first year of teaching and I was 23 and it was with another co-worker and he felt that women should not be an ag teacher.

THE COURT: All right. And so basically was there some hostility?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: And how did you handle it?

PROSPECTIVE JUROR NUMBER THIRTEEN: We --it was in-house with the principal and the superintendent. And he was let go.

THE COURT: He was?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yeah.

THE COURT: All right. Had it happened before with him?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes. With two other women ag teachers that were there before me.

THE COURT: All right. So they got to the point where he was expendable?

PROSPECTIVE JUROR NUMBER THIRTEEN: Well, he kind of resigned and left before they fired him.

THE COURT: All right. Understood. So has that been your only issue in employment?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: All right. And did you --did you ever first file like a claim with the EEOC or the DFEH?

PROSPECTIVE JUROR NUMBER THIRTEEN: No.

THE COURT: You just took it to the principal?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: And it was handled from there?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: Was it an informal process?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: And it was satisfactory?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: Any other workplace issues?

PROSPECTIVE JUROR NUMBER THIRTEEN: No.

THE COURT: You know what the claims are in this case. Could you hear the case with an open mind?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: Any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER THIRTEEN: No.

THE COURT: Thank you very much, Ms. Tweedy.

Mr. Lucatero.

PROSPECTIVE JUROR NUMBER FOURTEEN: I'm Adrian Lucatero. I live in Fresno. I'm a retail associate and I have --I graduated high school.

THE COURT: All right. High school. Your general area of residence?

PROSPECTIVE JUROR NUMBER FOURTEEN: Fresno.

THE COURT: And where are you a retail associate?

PROSPECTIVE JUROR NUMBER FOURTEEN: DeeDee's discount.

THE COURT: You have a spouse?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: Court experience?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: Any --ever been involved in any disputes or issues?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: How about employment issues in the workplace?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: None?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: You've heard the nature of this case, could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER FOURTEEN: Yes.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER FOURTEEN: No.

THE COURT: Thank you very much, Mr. Lucatero.

Mr. Dias.

PROSPECTIVE JUROR NUMBER FIFTEEN: My name is Lionel Dias. I'm a solid waste superintendent for the city of Hanford. I've been there 29 years. I still live in Hanford. I've been in and around the area of Hanford all my life.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER FIFTEEN: Yes, sir. She's pharmacy technician for the Community Hospital, city of Hanford.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER FIFTEEN: I have associate of science degree from a junior college.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: Experience with the court system?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: No disputes?

PROSPECTIVE JUROR NUMBER FIFTEEN: I had a lawsuit filed against me for vehicle accident.

THE COURT: Did it get settled?

PROSPECTIVE JUROR NUMBER FIFTEEN: Yes, sir.

THE COURT: Was it fairly resolved?

PROSPECTIVE JUROR NUMBER FIFTEEN: Yes, sir.

THE COURT: Do you have any issues with the court system?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: How about issues in the workplace? Ever been any disputes, complaints?

PROSPECTIVE JUROR NUMBER FIFTEEN: I've had one complaint filed against me and I've been in management about 17 years.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER FIFTEEN: That one complaint.

THE COURT: What was the nature of the complaint?

PROSPECTIVE JUROR NUMBER FIFTEEN: Employee felt he was dealt with unfairly and was let go.

THE COURT: It was a termination situation?

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct. He I was a part time employee.

THE COURT: Did it have to do with his performance or something else?

PROSPECTIVE JUROR NUMBER FIFTEEN: Something else. Well, it had to do partially with his performance. He failed to get --he --they're allowed to get within 1,000 hours when you're part time to get a commercial license. And he failed to get his license within that thousand hours.

THE COURT: All right. Were there other issues like attitude or insubordination?

PROSPECTIVE JUROR NUMBER FIFTEEN: There was other issues showing up late and other things, but that had nothing to do with the issue.

THE COURT: The main thing was not getting the license?

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: Within the thousand hours.

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: All right. And was that an objective standard? That was required in that particular job assignment?

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct. That's required.

THE COURT: All right. And so if you don't do it, then you go.

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: All right. So this wasn't so much a matter of you exercising discretion in evaluating, you were just following the rule.

PROSPECTIVE JUROR NUMBER FIFTEEN: That's correct.

THE COURT: Anything about that issue --that incident that could spill over into our case?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: Completely separate?

PROSPECTIVE JUROR NUMBER FIFTEEN: I

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THE COURT: Completely separate?

PROSPECTIVE JUROR NUMBER FIFTEEN: Well, the issue when it was filed, it was --it went to the NAACP and --but when they got my documentation, my records, they dropped it right away and it would have no bearing on this case.

THE COURT: All right. So there was alleged racial discrimination?

PROSPECTIVE JUROR NUMBER FIFTEEN: Well, he was alleging that – I don't know what it had do with the race, why they got involved into it. It had

to do with the thousand hours. Strictly the thousand hours.

THE COURT: All right. But if you know, did the employee raise the issue of race?

PROSPECTIVE JUROR NUMBER FIFTEEN: I believe so.

THE COURT: Was that ever communicated to you?

PROSPECTIVE JUROR NUMBER FIFTEEN: Not to my knowledge. I don't believe so.

THE COURT: All right. Who handled the resolution of the matter?

PROSPECTIVE JUROR NUMBER FIFTEEN: It was down with the personnel department and they handled it.

THE COURT: And so is there any possible spill over from that case to this one?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: Completely separate?

PROSPECTIVE JUROR NUMBER FIFTEEN: Completely.

THE COURT: Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER FIFTEEN: No, sir.

THE COURT: Thank you very much, Mr. Dias.

Mr. Mello.

PROSPECTIVE JUROR NUMBER SIXTEEN: Steve Mello. Turlock, California. I'm trying to think. Forgot.

THE COURT: Education?

PROSPECTIVE JUROR NUMBER SIXTEEN: Education. High school graduate. Married. Wife is a professional, she works with autistic and handicapped kids. She is continuing to go to school, college.

THE COURT: What's your activity?

PROSPECTIVE JUROR NUMBER SIXTEEN: What's that?

THE COURT: Your activity?

PROSPECTIVE JUROR NUMBER SIXTEEN: I work for Turlock Irrigation District. I'm a pre-supervisor on pipeline.

THE COURT: All right. You have people who work for you?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah, I have a crew of usually four to five guys.

THE COURT: All right. Ever serve on a jury?

PROSPECTIVE JUROR NUMBER SIXTEEN: No, sir.

THE COURT: Experience with the court system?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah. I've had a few misdemeanors.

THE COURT: All right. Were any of those, do you think, either deserved or undeserved?

PROSPECTIVE JUROR NUMBER SIXTEEN: It was a push.

THE COURT: All right. You recognize that there probably was cause for these matters to proceed as they did?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah.

THE COURT: Overall, do you think you were fairly treated?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes, sir.

THE COURT: Any grudges with the court system?

PROSPECTIVE JUROR NUMBER SIXTEEN: Na.

THE COURT: How about issues in the workplace, like we've been talking about? Disputes with, you know, employees with the employer?.

PROSPECTIVE JUROR NUMBER SIXTEEN: None that's been brought to my attention, no.

THE COURT: Wage and hour issues.

PROSPECTIVE JUROR NUMBER SIXTEEN: No.

THE COURT: You know the kind of case we have here. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER SIXTEEN: With the facts as they are right now that we know,

yes. But I will say I'm kind of a rub some dirt on it and walk it off kind of guy, so as of right now, yes.

THE COURT: All right. Well, I have to admit I'm not entirely sure that I understand what you just said. So if you don't mind, just so we can all know where you're coming from, could you explain?

PROSPECTIVE JUROR NUMBER SIXTEEN: Suck it up, in other words.

THE COURT: Me or you?

PROSPECTIVE JUROR NUMBER SIXTEEN: Me.

THE COURT: The main thing --put yourself at the plaintiff's table, put yourself at the defendant's table. Your rights are about to go on trial. Are you comfortable having someone who thinks as you think, your background and experience, serve as a judge of your rights?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah, if I'm in the right, yeah.

THE COURT: All right. And if you're in the wrong, you'll keep an open mind to determine whether someone is in the wrong; right?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes, sir.

THE COURT: You won't just assume that?

PROSPECTIVE JUROR NUMBER SIXTEEN: No.

THE COURT: All right. The main thing is neither side of this case starts a little bit ahead or behind.

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes.

THE COURT: The playing field is level.

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes.

THE COURT: All right. Is there any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER SIXTEEN: No, sir.

THE COURT: Thank you very much, Mr. Mello. Ms. Garcia.

PROSPECTIVE JUROR NUMBER SEVENTEEN: My name is Roxanne Garcia. And I'm a payroll clerk. And I have my bachelors. And -

THE COURT: Bachelors degree?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

THE COURT: Your general area of residence?

PROSPECTIVE JUROR NUMBER SEVENTEEN: I live southeast of Fresno. For 25 years.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No.

THE COURT: Do you supervise anybody in your workplace?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No.

THE COURT: You're supervised?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Yes.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No.

THE COURT: How about court experience?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No.

THE COURT: Have there ever been issues in your workplace that people have made claims, that the employer has raised issues?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Well -

THE COURT: None?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Just the normal.

THE COURT: All right. And listening to what we've been hearing about this case, could you hear this case with an open mind?

PROSPECTIVE JUROR NUMBER SEVENTEEN: Sure.

THE COURT: Any reason you'd be unable to serve on our jury?

PROSPECTIVE JUROR NUMBER SEVENTEEN: No.

THE COURT: Thank you very much, Ms. Garcia.

Ms. Geisler.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Hi.

THE COURT: Hello.

PROSPECTIVE JUROR NUMBER EIGHTEEN: I'm a little hard of hearing, as you probably noticed.

THE COURT: I haven't noticed, but I'll keep my voice up.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Okay. Thank you. My name is Jacqueline Geisler. I live in Bakersfield. And I've lived in the same house since 1972. Retired 15 years ago from Pacific Bell. My husband retired 15 years ago from Chevron. Just recently he went to work as a cotton picker.

THE COURT: In the fields?

PROSPECTIVE JUROR NUMBER EIGHTEEN: The field. Yes. Picking cotton.

THE COURT: All right. Your education?

PROSPECTIVE JUROR NUMBER EIGHTEEN: I've been on one --I beg --called for one criminal case.

THE COURT: Did you serve on the jury?

PROSPECTIVE JUROR NUMBER EIGHTEEN: During the jury selection, we were dismissed for lunch, when we came back, it had been

settled. Somebody came in and confessed to the crime.

THE COURT: All right. So it was over.

PROSPECTIVE JUROR NUMBER EIGHTEEN: That was the only experience I've ever had with the courts.

THE COURT: Your educational background?

PROSPECTIVE JUROR NUMBER EIGHTEEN: High school and some college courses and a lot of classes through Pac Bell.

THE COURT: All right. How about --were there disputes ever at Pac Bell?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yes, none that I was involved in.

THE COURT: All right. Did they involve issues like employees being treated fairly?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yeah, a lot of --a lot of it was. It was resolved with union stewards and stuff.

THE COURT: It was done through the union. It would be individual incidents or was there ever any general claims like groups of people were being unfairly treated?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Just individuals.

THE COURT: Individuals.

PROSPECTIVE JUROR NUMBER EIGHTEEN: There was one that did go to court and he was convicted.

THE COURT: All right. Was it a criminal case?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yes.

THE COURT: Was the employee stealing something or doing something -

PROSPECTIVE JUROR NUMBER EIGHTEEN: He had filed several grievances and was mad at his supervisor and other supervisors and he had slashed tires and there was one small bomb that went off at one of the supervisor's houses. So it was -

THE COURT: That was an extreme dispute. All right. But you weren't involved in that?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Only that I worked at the same location.

THE COURT: Yes. Now, you've heard the nature of the claims in this case. Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yeah.

THE COURT: Any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER EIGHTEEN: No.

THE COURT: Thank you very much. If we can pass the microphone down to Mr. Nunez.

Ladies and gentlemen, we're going to take an afternoon recess at this time. Let's take 15 minutes

until a quarter after three with the two admonitions. Please don't discuss the case among yourselves or with anybody else and remember we have to be back by 3:15 or we can't start unless we're all together. We're in recess until 3:15.

(The jury left the courtroom.)

THE COURT: Anything further before we recess?

MR. HAHESY: No, Your Honor.

MR. HO: No, Your Honor.

THE COURT: We're in recess until 3:15.

(Recess.)

THE COURT: We're back on the record in Rivera versus Nibco. And we are going to resume our selection. Mr. Nunez, we are now to you. If you could give us your background, please.

PROSPECTIVE JUROR NUMBER NINETEEN: Got 18 and a half years in the military. Three years in the Army, the rest in National Guard. I'm currently a security guard at Save Mart Center for 12 years.

THE COURT: Your education?

PROSPECTIVE JUROR NUMBER NINETEEN: High school.

THE COURT: General area of residence?

PROSPECTIVE JUROR NUMBER NINETEEN: Easton.

THE COURT: What was your rank on separation?

PROSPECTIVE JUROR NUMBER NINETEEN: E 4.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER NINETEEN: No, sir.

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER NINETEEN: I sat in a chair. Does that count?

THE COURT: Well, that's on the way to serving.

PROSPECTIVE JUROR NUMBER NINETEEN: I didn't get picked though.

THE COURT: All right. Any experience with the court system?

PROSPECTIVE JUROR NUMBER NINETEEN: Not to my knowledge.

THE COURT: Ever made any citizens arrests as a -

PROSPECTIVE JUROR NUMBER NINETEEN: No.

THE COURT: -- security guard?

PROSPECTIVE JUROR NUMBER NINETEEN: No, sir.

THE COURT: Never testified in court?

PROSPECTIVE JUROR NUMBER NINETEEN: No, sir.

THE COURT: Do you have a supervisor in the workplace?

PROSPECTIVE JUROR NUMBER NINETEEN: I have two. The main one and the one I work under.

THE COURT: All right. Any employment issues ever in the workplace?

PROSPECTIVE JUROR NUMBER NINETEEN: I try to turn a blind eye to everything.

THE COURT: You do?

PROSPECTIVE JUROR NUMBER NINETEEN: Yep.

THE COURT: All right. Whether it's in the Army or now, have there ever been any claims of impropriety or wrong doing by employees, by management, by anybody?

PROSPECTIVE JUROR NUMBER NINETEEN: Not to my knowledge.

THE COURT: All right. And so knowing what the issues are in this case, could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

THE COURT: Any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER NINETEEN: I've got an appointment November 5th at VA Hospital in Palo Alto.

THE COURT: All right. What day of the week is that?

PROSPECTIVE JUROR NUMBER NINETEEN: That's a Monday or a Wednesday, it's -

THE COURT: If it's a Monday, we'll be good. Because we're not in session on Monday. And so -

THE CLERK: November 5th? It's a Wednesday.

THE COURT: November 5th apparently is a Wednesday. And so what time is your appointment?

PROSPECTIVE JUROR NUMBER NINETEEN: Ten o'clock in the morning.

THE COURT: All right. Understood. Well, I'm going to leave this up to the parties.

PROSPECTIVE JUROR NUMBER NINETEEN: Well, I can cancel, I am picked.

THE COURT: You can?

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir. I just got to --need to know if I'm going to be picked or not.

THE COURT: All right. Now, when you say you're going to be paid.

PROSPECTIVE JUROR NUMBER NINETEEN: If I'm picked, I can cancel.

THE COURT: And who has to be paid, you or the VA?

PROSPECTIVE JUROR NUMBER NINETEEN: The VA.

THE COURT: All right. If I contact the VA and tell them that you're in jury service and we need to reschedule your appointment, we may be able to avoid the payment. You don't know that.

PROSPECTIVE JUROR NUMBER NINETEEN: I don't know that, sir.

THE COURT: I understand.

PROSPECTIVE JUROR NUMBER NINETEEN: I'd give you the address and phone number, but I left it at the house.

THE COURT: Well, I'm going to probably continue doing this at the moment. But what we'll do is we'll --why don't you stay in your seat. And we will assume that we can work that matter out.

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

THE COURT: Thank you very much, Mr. Nunez.

Mr. Holland.

PROSPECTIVE JUROR NUMBER TWENTY: Good afternoon, Your Honor. Kenneth Holland. I live in Shafter, California. Been married for 27 years. My wife is a homemaker. One daughter, 23 years of age. I'm a practicing attorney in Bakersfield. Law firm of Klein, Denatale, Goldner, et al. Been in court a lot.

THE COURT: Yes. What kind of law do you practice?

PROSPECTIVE JUROR NUMBER TWENTY: Primarily complex business litigation.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TWENTY: Although I have handled on a number of occasions

what I would call labor related cases. Wrongful termination cases.

THE COURT: Employment related issues?

PROSPECTIVE JUROR NUMBER TWENTY: Employment, yeah.

THE COURT: All right. So you're familiar with the field?

PROSPECTIVE JUROR NUMBER TWENTY: I am.

THE COURT: So in your personal background and experience, have you had any disputes that have affected you personally?

PROSPECTIVE JUROR NUMBER TWENTY: No. None whatsoever.

THE COURT: None. But you have handled them for clients?

PROSPECTIVE JUROR NUMBER TWENTY: I have.

THE COURT: And so is your representation of clients on predominantly the employee or the employer or is it mixed?

PROSPECTIVE JUROR NUMBER TWENTY: I --predominantly management.

THE COURT: All right. And do your employment cases center on a state or federal or both?

PROSPECTIVE JUROR NUMBER TWENTY: Typically state.

THE COURT: And have you had cases involving the DFEH and the Fair Employment and Housing Act law of California?

PROSPECTIVE JUROR NUMBER TWENTY: I have not.

THE COURT: All right. And so this would be a new area for you?

PROSPECTIVE JUROR NUMBER TWENTY: Somewhat, yeah. Uh-huh.

THE COURT: And how do you feel about approaching this kind of a case?

PROSPECTIVE JUROR NUMBER TWENTY: Sounds interesting.

THE COURT: What about the time commitment?

PROSPECTIVE JUROR NUMBER TWENTY: I'm concerned about the time commitment. I have a number of court appearances and depositions and a number of other matters legally related over the next two months. I have a trial scheduled here in Fresno on November 18th in probate court.

THE COURT: All right.

PROSPECTIVE JUROR NUMBER TWENTY: And then another one down in Indio.

THE COURT: Well, you know best whether your schedule would permit you to serve I recognize you have commitments.

PROSPECTIVE JUROR NUMBER TWENTY: My comprehension is I would have a hard time serving for that length of time.

THE COURT: All right. We'll get a different case for you to serve on. I'm going to thank and excuse you from this case. Please call the number after five on Friday.

PROSPECTIVE JUROR NUMBER TWENTY: Very well. Thank you.

THE CLERK: April Garza.

THE COURT: Good afternoon, Ms. Garza.

PROSPECTIVE JUROR NUMBER TWENTY: Hello.

THE COURT: Do you know anything about the case or anybody associated with it?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Have any of my questions raised issues for you?

PROSPECTIVE JUROR NUMBER TWENTY: I have a --I filed a complaint with my company in the beginning of the year and it's still ongoing.

THE COURT: All right. And what did it concern?

PROSPECTIVE JUROR NUMBER TWENTY: It concerns sexual harassment, it concerns employees that were hired stealing information from their past employer.

THE COURT: All right. Have you ever heard the term whistle blower?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Are you acting as a whistle blower?

PROSPECTIVE JUROR NUMBER TWENTY: In the process.

THE COURT: In the process. All right. You're, in effect, identifying employees who you believe have stole confidential business information?

PROSPECTIVE JUROR NUMBER TWENTY: Correct.

THE COURT: And you've been allegedly the victim of sexual harassment?

PROSPECTIVE JUROR NUMBER TWENTY: I've witnessed sexual harassment.

THE COURT: You've witnessed in the workplace.

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: So who have you reported this to?

PROSPECTIVE JUROR NUMBER TWENTY: Management.

THE COURT: All right. To your knowledge, has there been any formal complaint with the EEOC or the DFEH been filed?

PROSPECTIVE JUROR NUMBER TWENTY: No. But attorneys have been involved.

THE COURT: There are attorneys involved? Company attorneys?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Have you been interviewed?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: What do you think that the impact, if any, on this case would be if you were a juror from all that's going on with you?

PROSPECTIVE JUROR NUMBER TWENTY: My --for me to serve on this?

THE COURT: Yes.

PROSPECTIVE JUROR NUMBER TWENTY: I could serve fairly, but it would be up to the attorneys to say.

THE COURT: Yes. Well, it will be up to the attorneys. But you believe that you're open-minded, despite what's going on in your workplace?

PROSPECTIVE JUROR NUMBER TWENTY: Correct.

THE COURT: You understand this case is a different workplace.

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: It's an entirely different case.

PROSPECTIVE JUROR NUMBER TWENTY: Correct.

THE COURT: Could you assure each party that you would keep separate what's going on at your firm from their case?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: You would keep it separate?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: All right. Now, the nature of your work is?

PROSPECTIVE JUROR NUMBER TWENTY: I'm a purchasing person. I buy all the materials for the production runs.

THE COURT: All right. And how many employees are there at your firm?

PROSPECTIVE JUROR NUMBER TWENTY: Over 200.

THE COURT: You have a supervisor?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Your educational background?

PROSPECTIVE JUROR NUMBER TWENTY: High school graduate.

THE COURT: Do you have a spouse?

PROSPECTIVE JUROR NUMBER TWENTY: Yeah, boyfriend.

THE COURT: Significant other.

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: And what's his activity?

PROSPECTIVE JUROR NUMBER TWENTY: He's independent. He works here and there.

THE COURT: All right. What kind of work does he do here and there?

PROSPECTIVE JUROR NUMBER TWENTY: He's a cheesemaker.

THE COURT: All right. Have you ever served on a jury?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Any experience with the court system?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Besides the activity you've already described and we've gone over, have you ever filed any other complaints?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Been involved in any disputes?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Had any complaints made against you?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Is it your sense, looking at the workplace that you're in now, that there is a problem

there or do you think that these claims are not meritorious?

PROSPECTIVE JUROR NUMBER TWENTY: Oh, definitely there's a problem.

THE COURT: There is a problem?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Is it with just a few people or with a lot of people?

PROSPECTIVE JUROR NUMBER TWENTY: Management.

THE COURT: Management. All of management?

PROSPECTIVE JUROR NUMBER TWENTY: The majority, yes.

THE COURT: And this would be from your supervisors level all the way up the chain of command?

PROSPECTIVE JUROR NUMBER TWENTY: Correct.

THE COURT: How high does that go?

PROSPECTIVE JUROR NUMBER TWENTY: CEO.

THE COURT: Is the CEO in your area?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: All right. So the company's a local company?

PROSPECTIVE JUROR NUMBER TWENTY: In my town, yes.

THE COURT: Yes. You've already told us you could keep it separate.

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Could you hear our case with an open mind?

PROSPECTIVE JUROR NUMBER TWENTY: Yes.

THE COURT: Is there any reason you'd be unable to serve?

PROSPECTIVE JUROR NUMBER TWENTY: No.

THE COURT: Thank you very much.

Ms. Stockton.

PROSPECTIVE JUROR NUMBER TWENTY-ONE: I'm Pat Stockton. Patricia Stockton. I live in West Bakersfield. I've been there about five, six years. I'm retired. I was a teacher. A high school teacher. I taught math. So I have college plus.

THE COURT: Credential.

PROSPECTIVE JUROR NUMBER TWENTY-ONE: My husband is --works for an insurance company. He's a vice president of a major insurance company. And --

THE COURT: Ever serve on a jury?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No, I haven't. This is as far as I've ever gotten.

THE COURT: How about court experience?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: None.

THE COURT: Any formal type of disputes, you know, with the companies, products?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No, none.

THE COURT: None. Interaction with any public agencies?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No.

THE COURT: Besides teaching.

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No, that's it.

THE COURT: How about issues in the workplace, were there ever, while you were working, claims of employee mistreatment or wage and hour disputes or working condition problems?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: None.

THE COURT: Were you represented by a union?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yes.

THE COURT: And was the bargaining of terms and conditions of employment compensation, vacation, inservice training, all those kinds of things handled by the union?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yes.

THE COURT: And how would that be communicated? Would the employees meet and vote on what would be done or would the union tell you what they were going to do?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No, it was voted upon.

THE COURT: There was input?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yes.

THE COURT: And back and forth exchange?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Somewhat, yes.

THE COURT: In terms of your workplace there, was it in the Kern County Schools?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No, I was in northern California.

THE COURT: In northern California. All right. In that school district, in your particular school, how would you describe the working conditions?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Oh, it was fine.

THE COURT: Good?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yeah.

THE COURT: No problems?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: None at all.

THE COURT: Now you know the nature of the claims in this case.

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yes.

THE COURT: Could you hear this kind of a case with an open mind?

PROSPECTIVE JUROR NUMBER TWENTY-ONE: Yes.

THE COURT: Is there any reason you'd be unable to serve on our jury in.

PROSPECTIVE JUROR NUMBER TWENTY-ONE: No.

THE COURT: All right. Thank you very much.

Now, let me ask this collectively of all 21 of you. Is there anybody who has the belief that if a person believes that her or his rights have been violated, that they should not come to a court with a lawsuit to seek redress based on what the law would provide if they can prove their case? Is there anybody who just thinks that nobody should come to court and request money relief? If you feel that way, please raise your hand.

Nobody does.

In this case, we have a second kind of relief that is sought. Punitive damages. And punitive damages are a special form of compensation that the law authorizes but doesn't require. When the necessary elements are proved by a different standard, by clear and convincing evidence. And essentially, these

damages are not to compensate, whether they are to punish or to make an example of somebody who is engaged in conduct that violates the law.

Is there anybody who has any kind of feelings or beliefs, either pro or con punitive damages that you thought about before that would potentially impact in this case? Please raise your hand.

Nobody does.

Is there anybody who would be unwilling or unable to consider such a claim? You would just say, well, I'm not going to even look at the claim for punitive damages. I won't consider it. Please raise your hand if you would be unable or unwilling.

And is there anybody who would be unwilling or unable to basically not follow the law on that kind of remedy when I tell you it will be different from the other measure of relief that is sought in the case. Anybody who would be unable or unwilling to follow the law, please raise your hand. Nobody does.

Now, we've had a couple of people tell us their views about too many lawsuits, not enough --or at least some of those lawsuits don't have merit. Let me ask for anybody who has the view that the awards that are given in cases are just out of control,they're too big, there's something wrong with the system. If anybody has that view, please raise your hand.

All right. Mr. Douglas. What is your view?

PROSPECTIVE JUROR NUMBER SIX: I think that a lot of these awards that they give people, we

could go back to what's happened at Fresno State, are way out of control.

THE COURT: All right. In other words, you followed that case?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And then when the award came in, I believe it was something in the area of 19 million dollars.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And you thought that was too much money?

PROSPECTIVE JUROR NUMBER SIX: Way too much money.

THE COURT: All right. Would you agree that that was a separate case?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And in that case, you didn't think justice was done?

PROSPECTIVE JUROR NUMBER SIX: Well, I think --I think justice was done, yes, but just the award of that much money was way in excess.

THE COURT: All right. Well, that's a very considerate answer and incisive answer. So you don't quarrel with the result, the fact that the plaintiff won the case, but you think that the jury was not correct in awarding the amount of damages they did?

PROSPECTIVE JUROR NUMBER SIX: Correct.

THE COURT: Do you agree that the amount of damages if any case should be considered in the individual case?

PROSPECTIVE JUROR NUMBER SIX: Yeah.

THE COURT: Should be on a case by case basis.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: And so would you be willing to express your opinions and your views about what the value of the case is if it was determined that the law had been violated?

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: You wouldn't refuse to consider damages; would you?

PROSPECTIVE JUROR NUMBER SIX: No.

THE COURT: No. But for you, would there have to be any more proof than the law requires for you to be able and willing to award damages?

PROSPECTIVE JUROR NUMBER SIX: If it --if it was proven that they were done wrong, I would not have a problem of awarding damages.

THE COURT: Understood. All right.

PROSPECTIVE JUROR NUMBER SIX: My problem is is how much.

THE COURT: How much. All right. And so there's got to be some relationship between the harm that has even waited and the size of the compensation for it.

PROSPECTIVE JUROR NUMBER SIX: Correct.

THE COURT: All right. Now, we had another hand up. And that was Ms. Geisler.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yes.

THE COURT: What's your view?

PROSPECTIVE JUROR NUMBER EIGHTEEN: I am the same as he is. I think some of the awards have been way too high. But, you know, they deserve --

THE COURT: Something.

PROSPECTIVE JUROR NUMBER EIGHTEEN: --compensation, but sometimes it's just way in --way out of a normal person's, you know, range of value.

THE COURT: All right. But do you agree that it should be a case by case evaluation?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Definitely.

THE COURT: All right. And you're not unwilling to consider a claim for damages?

PROSPECTIVE JUROR NUMBER EIGHTEEN: No.

THE COURT: And if the law provided for such a remedy and the case was proved to the required preponderance of the evidence standard, would you be willing to make an award of damages?

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yes.

THE COURT: All right. But you're going to look at the amount just as Mr. Douglas said he would.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Yes.

THE COURT: Would you require to prove damages, the plaintiff to do more than the law says that the plaintiff has to prove to be rewarded damages?

PROSPECTIVE JUROR NUMBER EIGHTEEN: No.

THE COURT: All right. You'll follow the law.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Right.

THE COURT: All right. Anything else you want to tell us about your thoughts about the size of damage awards?

PROSPECTIVE JUROR NUMBER EIGHTEEN: No.

THE COURT: You're thinking of the McDonald's case? The lady who spilled the coffee in her lap. And ended up with two million dollars.

All right. Thank you very much, again, for sharing --this is what the parties want to know and understand, basically how you think about these issues and how you're going to view them.

Now, let me ask each of you to put yourselves -- I've done this with some of you individually, but now I want everybody to consider you're at the plaintiff's table. You're at the defendant's table. Your rights

are about to go on trial. Are you comfortable having somebody serve as the judge of your rights who thinks as you think, who knows what you know, with your background and experience, anybody who would not be comfortable having yourself as the judge of your rights based on the issues that are presented in this case, please raise your hand.

Nobody does.

Now, ladies and gentlemen, I am going to invite the attorneys to ask any questions that they have on subjects that I haven't covered. And so what I will ask is that you give them the same fair cooperation that you have given me, please. Mr. Smith, do you wish to inquire?

MR. SMITH: Thank you, Your Honor. Yes, I do.

Good afternoon, ladies and gentlemen of the jury. You were introduced to me earlier. My name is Willy Smith and I represent the plaintiffs, 23 plaintiffs in this case, among with my co-counsel. And I have the opportunity to ask you some questions this afternoon.

Now, I should state before I begin that I know that some of you are nervous and saying, please don't call on me first. So I'll try to start off asking you some general questions of the group and then perhaps we'll move to asking some more specific questions after we all kind of relax and get into it. I've been doing this for 35 years and I get a little

nervous too when I first get up. So it's fine to be a little nervous.

I should tell you before we begin that there are no right answers and there are no wrong answers that any of you can give. We just want to ask you questions about this case in view of the very nature of the case to see whether or not you are somebody who may have a particular thought or thought process that may be helpful or perhaps even unhelpful to your being on this jury. So I'm going to get started in view of the fact that I have a limited amount of time since the judge has already spent a good deal of time asking you questions.

I think I'm going to start off by asking a general question of you about language first. Because more than one of you, in filling out your jury questionnaire, made comments about immigration or language. And I just want to ask a few questions, and maybe we can get some understanding of what your particular feelings are on that issue. Particularly since this case involves issues related to that.

So I'm going to start off by asking a general question about language. And since many of you stated --or several of you stated in your jury questionnaire that you thought that people in the workplace should speak English. I want to ask if your answer to the question involving whether or not English should be required if someone is dealing

with the public or if they're not dealing with the public. If that distinguishes in some respect the fluency or the ability of the person to speak in English. So I'm going to ask that general question first and see if somebody volunteers. And then if nobody does, maybe I'll ask for a raise of hands. Anybody want to start. Yes.

PROSPECTIVE JUROR NUMBER THIRTEEN: I read that question. It seemed pretty broad to me. And I know I put they should speak English in the work field. But if they're dealing with public --I mean, I don't --I'm a school teacher. We teach English in school. So I should start there. But I think if they're dealing with public, they should definitely speak English. But if they're in the work field, they can speak whatever they want to do. But if they're dealing with somebody that speaks English, yes.

MR. SMITH: So if I understand you, you're saying you make a slight distinction between someone who deals with the public --

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

MR. SMITH: -- and may need to speak with a level of fluency that's higher than somebody who is, for example, doing some routine machine work and speaking primarily to co-workers?

PROSPECTIVE JUROR NUMBER THIRTEEN: Yes.

THE COURT: I saw a hand in the back. Mr. Douglas.

PROSPECTIVE JUROR NUMBER SIX: Yes.

THE COURT: Yes. Can you tell us what your feeling is, Mr. Douglas?

PROSPECTIVE JUROR NUMBER SIX: Well, I agree with her. But even in the general workplace, if they're --he's working with some machinery and he can't speak English and I can't speak his language, if he's doing something wrong that he needs to know about, to keep from getting hurt, he should be able to understand English.

MR. SMITH: Okay. Do you believe that there are perhaps different levels of speaking English or other ways to communicate than English so that those kinds of issues --

PROSPECTIVE JUROR NUMBER SIX: Oh, yes.

MR. SMITH: -- that you address. Broken machinery or broken parts can be addressed.

PROSPECTIVE JUROR NUMBER SIX: I don't mean fluent. But enough that he knows that what he's trying to tell him is to protect him from getting hurt.

MR. SMITH: Okay. I understand. And a lot of people feel that way. And if there's anybody else who feels that way, too, I'd like to hear from you. What your particular attitude is about that. Mr. Brooks.

PROSPECTIVE JUROR NUMBER THREE: Yes, sir.

MR. SMITH: Can you tell us what you think about it, please?

PROSPECTIVE JUROR NUMBER THREE: Yeah. I work in farming, so obviously I deal with the Mexican culture. There --I do strongly agree that there should be some type of, I don't know, better vocabulary, but you should be able to speak English to a certain point because it's hard --you have to make up all these documents twice and so forth and so on. And then to go into like --my main argument with the whole deal is you have older people that migrated here, obviously I don't feel as much that they need to speak as much English. But as you come into your younger kids, they use that as an excuse or they go back and forth or don't know English, which if they're born and raised here, they should know English and be able to establish in the work force with some speaking English.

MR. SMITH: I take it, Mr. Brooks, that you've had some problems in that regard that you might want to enlighten us about?

PROSPECTIVE JUROR NUMBER THREE: Yeah. I mean, because they'll play --they play games with you. They play games with me all the time. Younger guys, my age or less, which I know they were born and raised here or they say they were, and they'll play games with you. They'll say, yeah, I

understand, and then they do something else. Well, I didn't understand. And then they go to human resources and tell them well, I didn't understand it. So it's a -- communication is big.

MR. SMITH: Let me just ask you this, Mr. Brooks. Do you have employees in the workplace who from time to time act as translators or interpreters at all?

PROSPECTIVE JUROR NUMBER THREE: Yeah. Yes.

MR. SMITH: Has that been a satisfactory means of communication with you?

PROSPECTIVE JUROR NUMBER THREE: No, not my style of work. It's --no. Because they're not always there.

MR. SMITH: Do you have any training for any of the supervisors so the supervisors also pick up any Spanish or Spanglish as I think you mentioned earlier. So that you can communicate with your employees?

PROSPECTIVE JUROR NUMBER THREE: Yeah. No, I want to communicate. So I do the best that I can and we do have different things that the employer provides us with educational tools and so forth. But -

MR. SMITH: Let me just followup there and I'll leave you alone. When you say educational tools, are you speaking of translations or films or maybe you can explain what you mean.

PROSPECTIVE JUROR NUMBER THREE: To help us or me speak Spanish so I can communicate in their language instead of mine.

MR. SMITH: Okay. Anybody else want to address the issue. Yes, Mr. Mello, I think it is. Yes. Can you -

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah.

MR. SMITH: And please excuse me if I mispronounce anybody's name. I think I have them down, but Mr. Mello, that's an easy one. So why don't you go ahead.

PROSPECTIVE JUROR NUMBER SIXTEEN: Working in the field like I do, I work around equipment and what I do for a living, we go inside the irrigation pipes and patch them from the inside out. I can't rely on point to the heavy end of a canal where there's millions of gallons of water behind the gate and telling the worker to lock that and then have the confidence of sending somebody else into the pipeline and then that gate doesn't get locked and it gets opened.

Now what happens is since I'm the supervisor, I'm sitting in a back room at this very office, on the other end of this whole ordeal, hoping you all pick me some good guys in the box so I don't go to jail. So I think it needs to be --they need to understand and be able to speak fairly fairly well so there is

communication. And I know when I say something, that it gets taken care of the correct way.

MR. SMITH: Do the employees at your workplace communicate in any English at all?

PROSPECTIVE JUROR NUMBER SIXTEEN: Yes.

MR. SMITH: Or is it primarily Spanish?

PROSPECTIVE JUROR NUMBER SIXTEEN: No, it's primarily at my work it is English. But I have been --am I father owned a dairy when I was younger and we had milkers and outside help that I couldn't talk to them other than point to them.

MR. SMITH: I see. So they didn't even know any basic kind of English to communicate.

PROSPECTIVE JUROR NUMBER SIXTEEN: No.

MR. SMITH: --with you to tell you if something was wrong or.

PROSPECTIVE JUROR NUMBER SIXTEEN: They could give you thumbs up or thumbs down and that was about it.

MR. SMITH: And that was it. Okay. Anybody else would like to address the problem that we're talking about?

PROSPECTIVE JUROR NUMBER FIVE: I put it on mine that I thought that they should speak, especially if they're in the public. But also my husband is a farmer and he --he's had to teach himself Spanish so that he could relate to them. And

it seems funny that he has to learn Spanish as opposed to them learning English that we're here in the -

MR. SMITH: Ms. Spycher.

PROSPECTIVE JUROR NUMBER FIVE: Spycher.

MR. SMITH: I'm sorry.

PROSPECTIVE JUROR NUMBER FIVE: That's okay.

MR. SMITH: Have any of your employees learned to speak basic English so that they can communicate in the workplace?

PROSPECTIVE JUROR NUMBER FIVE: I'm sure some do. I know I have a hard --I don't speak Spanish. I wish I did, but I don't. So when they come to the house, I do have a hard time like when they need to find my husband and stuff, we don't speak well at all.

MR. SMITH: I understand. Anyone else would like to --yes. I'm going to ask Ms. Geisler.

PROSPECTIVE JUROR NUMBER EIGHTEEN: That's correct.

MR. SMITH: Okay. Ms. Geisler, would you like to address the subject and tell us your feelings, please?

PROSPECTIVE JUROR NUMBER EIGHTEEN: I put it on my sheet also and when they are dealing with the public, I really do believe they should speak English. And because there's a lot of

misunderstanding with different words and stuff. We could say something, I've tried to learn Spanish and I don't get the roll of the R's or something right. And I get the mixed up different words. And I do believe they should. But there are jobs, I'm sure, in factories or something else, that wouldn't be bothered.

MR. SMITH: Okay. Yes. I'm going to ask Mr. Veldstra, former deputy sheriff; right?

PROSPECTIVE JUROR NUMBER SEVEN: Correct.

MR. SMITH: Can you tell us what your experience has been?

PROSPECTIVE JUROR NUMBER SEVEN: I am --and I put this on my form. I believe that everyone needs a common tool of communication. That's not to say that it has to be English or has to be Spanish, but depending on the type of work situation it is, that common communication could be simple hand signals. And that would work in one type of situation. Whereas in another type of situation, it would not, where it would need to be a clear verbal type of communication. So it --my feeling is it depends on the circumstances and the type of job setting.

MR. SMITH: Mr. Stanford, I see I shaking your hey next to him. Can you uh, I see you want to address the subject.

PROSPECTIVE JUROR NUMBER EIGHT: I put that in my form as well the reason why is I've been in electronics, mechanical, pneumatic management maintenance all my life and I worked as high as 30,000 volts and 483 feet. And I've had people that either didn't hear you right or do something wrong, didn't lock out the electrical and the next thing I know sparks were going all over. And I'm a young man, sir, but I really don't want to die or anybody.

MR. SMITH: I see. I'm going to change the subject briefly in view of the fact that I have a limited amount of time. We have another issue that I'd like to address. I think I have a feeling of your opinions about the issue of language. One of the claims that the plaintiffs is making, as you'll find out, is that the plaintiffs are claiming there's some emotional distress and may be asking you to award them monetary damages for it. And some of you have indicated in your jury questionnaire that you had some feelings about emotional distress. So I'm going to start with number six, Mr. Douglas, and ask him what his feeling is about whether or not someone might be entitled to an award of emotional distress, if ever.

PROSPECTIVE JUROR NUMBER SIX: I'm not --I'm not really sure if I understand where you're going with this.

MR. SMITH: Let me see if I can sharpen this up a little bit, Mr. Douglas. It's easy for a jury to see somebody's broken arm or broken leg, those are visible injuries and there's a report that said the arm was broken and whatever. Sometimes emotional distress damages aren't so visible, the scars, the emotional scars aren't as visible and it's difficult, sometimes to understand the extent to which someone might be emotionally distressed based on something that they claim happened. I'm trying to find out what your attitude is about those kinds of injuries that you don't see. Do you believe that there are such injuries and if so, are you willing to give money -

PROSPECTIVE JUROR NUMBER SIX: I'm kind of believing that you're leading this that it's gone on for a long period of time. Because I don't think if somebody said something to somebody a couple of times that that's going to be emotional distress.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER SIX: Now, if this is something that's happened over a lot of --a long period of time, I mean, if there's something that should have been done about it at the beginning, but not just let it ride and then all of a sudden, well, I'm a basket case so I'm going to --I want a lot of money for it, no, I don't agree with it.

MR. SMITH: Suppose somebody provides you with some proof that, in fact, they do have some emotional injury and the Court instructs you that one of the damages you might be able to give is for emotional distress. Are you predisposed not to give emotional distress or --to somebody? In other words, I'm asking if the plaintiff starts off behind with you because you were skeptical of emotional distress damages?

PROSPECTIVE JUROR NUMBER SIX: That's a --that's a hard one to figure.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER SIX: Because I --I just can't, just because somebody tells me and maybe Joe Blow here has said, well, yeah, I think he does have it. That don't --that's not necessarily true.

MR. SMITH: Okay. So you would be somewhat skeptical of somebody claiming --

PROSPECTIVE JUROR NUMBER SIX: Yes, I would.

MR. SMITH: --emotional distress damages. All right. Thank you. Anybody else have that feeling? And I'm asking that question because a lot of people feel that way. So don't be embarrassed or ashamed to raise your hand and tell me what you think. Yes, ma'am. Ms. Geisler.

PROSPECTIVE JUROR NUMBER EIGHTEEN: Being in the work force for 28 years at

a major company, Pac Bell, I saw people take jobs that they were not really qualified to take. Physically or even just --we're talking somebody going out and climbing telephone poles and going into manholes and stuff like that. And they really weren't physically --that wasn't work for them. They would have --you know, if they're afraid of spiders, you know, you can't go in a manhole. So in that situation, I kind of feel that sometimes people take jobs they're not really capable of doing.

MR. SMITH: Okay. Well, in this case, and I don't want to go into the facts. I'm not here to argue the facts of this case. If someone raised an issue of emotional injury based on them feeling that they were not laid off properly or something of that nature, would you have --would you be skeptical of that is kinds of claims if someone didn't come in with a doctor's letter saying, hey, this person has emotional distress, for example?

PROSPECTIVE JUROR NUMBER EIGHTEEN: If they're in a job they can handle, they end up with emotional stress due to the boss always looking over their shoulder or always telling them they're doing something wrong, well, that's a different case. So I'd have to wait until the facts are provided.

MR. SMITH: Okay. Mr. Mello is sitting there. I can see the wheels turning. Mr. Mello.

PROSPECTIVE JUROR NUMBER SIXTEEN: Are you asking after you've been laid off, now you're coming up with emotional distress? Because that's just stress. That's just oh, no the bills are still coming and I got no where to go.

MR. SMITH: So you don't feel that that's a legitimate claim?

PROSPECTIVE JUROR NUMBER SIXTEEN: No, I mean if it's there before, I can see, okay. If there's claims before, I can see it being there.

MR. SMITH: Suppose -

PROSPECTIVE JUROR NUMBER SIXTEEN: But you can't go get laid off and fired and then all of a sudden have it.

MR. SMITH: Suppose the person claims, for example, that they suffered emotional distress because they were wrongfully laid off or that they shouldn't have been and that's caused me emotional distress. Would you be skeptical of that kind of claim given what you've just told us?

PROSPECTIVE JUROR NUMBER SIXTEEN: Well, yeah, because I --in my opinion, that's just stress.

MR. SMITH: Okay. You don't consider that.

PROSPECTIVE JUROR NUMBER SIXTEEN: That's having no job and bills.

MR. SMITH: And you wouldn't want to give money for that?

PROSPECTIVE JUROR NUMBER SIXTEEN: No.

MR. SMITH: Okay. That's good. Anybody else feel that way? We've got two people. Yes. Mr. Brooks.

PROSPECTIVE JUROR NUMBER THREE: Yes, sir.

MR. SMITH: Do you feel the same way as you shouldn't give money for that?

PROSPECTIVE JUROR NUMBER THREE: Most definitely. If they're fired or laid off, that's just the facts of life.

MR. SMITH: No money, laid off, that's the way it goes.

PROSPECTIVE JUROR NUMBER THREE: Yeah. Most definitely.

MR. SMITH: Okay. Anybody else feel that way? I'm --okay. I'm getting a big show of hands here.

THE COURT: Well, let's add this element to it. If it turned out that the evidence showed that there was no legal justification for the laying off or the termination of employment and, in fact, if the evidence were to show that the law had been violated, would that change your view about considering the issue of what effect that would have on a person's emotions, on their outlook, on their general mental health?

MR. SMITH: Yes, I see some of the same hands. I'm going to start with Mr. Mello again.

PROSPECTIVE JUROR NUMBER SIXTEEN: If the law was violated, yes, then there is a claim.

MR. SMITH: So you would believe that if the law had been violated, a person might be entitled to get.

PROSPECTIVE JUROR NUMBER SIXTEEN: Yeah, if somebody got, for lack of a better word, shafted, then yeah.

MR. SMITH: Okay. Mr. Brooks, I saw you shake your head too.

PROSPECTIVE JUROR NUMBER THREE: A single person or all 23 or 24 people are we talking?

MR. SMITH: Well, on an individual basis, you would be asked to make a determination. It would not be a decision but.

PROSPECTIVE JUROR NUMBER THREE: I think companies are in business to make money and if they need to get rid of someone, I think they should have the right.

MR. SMITH: Okay. Without having to pay damages such as that.

PROSPECTIVE JUROR NUMBER THREE: That's correct.

MR. SMITH: Thank you. I appreciate your honesty. Anybody else feel that way beyond what we've already addressed?

Okay. Mr. Nunez, I noticed in reviewing your form that you didn't fill out anything regarding

emotional distress. May I ask you about that question?

PROSPECTIVE JUROR NUMBER NINETEEN: Because it was a man..

MR. SMITH: Pardon?

PROSPECTIVE JUROR NUMBER NINETEEN: If it was a man. Men shouldn't have to worry about complaining of distress. Women, I can understand.

MR. SMITH: Okay. So in your belief, someone, in order to be compensated for emotional distress, would have to be a woman, not a man?

PROSPECTIVE JUROR NUMBER NINETEEN: Oh, yeah, because they got children at home. They got more work than the man does.

MR. SMITH: Well, we got 23 women plaintiffs in this case, Mr. Nunez, does it make a difference?

PROSPECTIVE JUROR NUMBER NINETEEN: If they're moms.

MR. SMITH: Well, we're not going to talk about the evidence. I'm just trying to find out right now what your belief is about who might be entitled to an award of emotional distress damages possibly.

PROSPECTIVE JUROR NUMBER NINETEEN: If they have a doctor's excuse.

MR. SMITH: So they would have to have a doctor's excuse. Suppose the judge instructed you that that was not the standard, that you did not

have to have a doctors excuse to get that. Could you follow that instruction?

PROSPECTIVE JUROR NUMBER NINETEEN: Yes, sir.

MR. SMITH: Okay. And you could award emotional distress damages for men as well as females? You could not.

PROSPECTIVE JUROR NUMBER NINETEEN: I do not believe no man should be under stress. A man should be able to handle any situation.

MR. SMITH: Okay. Can you tell us why?

PROSPECTIVE JUROR NUMBER NINETEEN: That's the way I was brought up.

MR. SMITH: Okay. How am I doing on time, Your Honor?

THE COURT: You have about five minutes.

MR. SMITH: Thank you. Mr. Paul.

PROSPECTIVE JUROR NUMBER ONE: Yes.

MR. SMITH: I notice that in completing your jury form, that you left out some of the questions also regarding emotional distress. Can you tell us, please, what your feeling is about the issue that we've been discussing here in view of the fact that my clients will be making a claim for those kinds of damages assuming we win?

PROSPECTIVE JUROR NUMBER ONE: Until I hear the whole case, and hear all the evidence, I can't make a determination. So I have to hear

everything before I'm going to sit here and say, no, they deserve it. Now, if they deserve it, with all the evidence that's put out there, okay. Fine. But not until I hear the whole case.

MR. SMITH: I suppose what I'm trying to find out is this: If you have any attitudes that might put us a step behind in terms of trying to prove those kinds of damages, do we start off in the hole? Do we start off having a bigger burden than the other side because of an attitude that you have? So that's why I'm asking you the question, not whether or not the proof comes in a certain way, but I'm trying to find out about your attitude and if you can sort of tell us about that.

PROSPECTIVE JUROR NUMBER ONE: No, we're on an even playing field right now. So everything is even across. So present the evidence and then that's all. I'm not swaying one way or the other until all the evidence is out there.

MR. SMITH: Okay. Mr. Paul, were you one of the people who raised your hand --I don't recall -- about the size of the damages awards?

PROSPECTIVE JUROR NUMBER ONE: No.

MR. SMITH: Did I -

PROSPECTIVE JUROR NUMBER ONE: No.

MR. SMITH: I know Mr. Ward --I mean Mr. -- Mr. Ward. Mr. Douglas raised his hand. Right? Mr. Douglas, you believe that the awards in some of

these cases are out of proportion to the size that they should be; is that correct?

PROSPECTIVE JUROR NUMBER SIX: Yes very much out of proportion.

MR. SMITH: Okay. And you also indicated in your form that you believe that you'd have to see special proof of emotional distress. Can you tell us what you meant by that?

PROSPECTIVE JUROR NUMBER SIX: I don't want --I don't want somebody coming here and saying, I suffered emotional distress because I was let go. That's your word. That's what he he's saying. I have no proof that he's showing emotional distress.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER SIX: Just because he said so.

MR. SMITH: So you would require that somebody else outside of that person attest to or support -

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. SMITH: -- is the person's version that they had suffered some emotional distress?

PROSPECTIVE JUROR NUMBER SIX: Like a medical doctor.

MR. SMITH: Like a medical doctor?

PROSPECTIVE JUROR NUMBER SIX: Yes.

MR. SMITH: Okay. Let me go back for a moment to what we were talking about, started off talking about the size of awards. Your --if you're

selected for this jury, do you believe that in some respects, you don't have any say over the size of the award. In other words, that if you end up on this jury, that the rest of the people will decide the size of the award, but you don't have any say in it?

PROSPECTIVE JUROR NUMBER SIX: If we got on the jury and there was a 20 million dollars was awarded. Well, I didn't agree with it, I wouldn't --I wouldn't vote for it.

MR. SMITH: Okay. You have a right to stick by your guns. I'm just trying to find out in terms of jury --the size of jury awards, do you understand that you are the sole judge of that. I mean you, by you, the jury, that the panel decides the size of the award based on the evidence supposedly that you hear during the case.

PROSPECTIVE JUROR NUMBER SIX: That's correct, yes.

MR. SMITH: Okay.

PROSPECTIVE JUROR NUMBER SIX: But I may not agree with it.

MR. SMITH: And if you're on the jury, that you will have a say in the size of that award.

PROSPECTIVE JUROR NUMBER SIX: And I would tell the jury that that's way too much money.

MR. SMITH: What's way too much money?

PROSPECTIVE JUROR NUMBER SIX: If the jury --if the other 11 jurors decided, I guess there's going to be twelve on it, but decided, okay, we think

It's 20 million dollars and I don't think so, well, I won't --I'll tell them I don't think so.

MR. SMITH: Okay. All right. That's fair enough. Anybody else are any feelings that you want to express regarding that?

Okay.

PROSPECTIVE JUROR NUMBER NINETEEN: You know, like that fellow gets shot or something, his family or financial distress. Now he might be awarded money if he survived because he lost his job.

MR. SMITH: Okay. I think I've just about run out of time. So I'm going to sit and allow opposing counsel to ask you a few questions.

I thank you for your time ask your patience and your cooperation. And I'm going to sit and I will talk to you later on during the trial. Thank you.

THE COURT: Mr. Hahesy, do you wish to inquire?

MR. HAHESY: Yes, Your Honor.

THE COURT: Please proceed.

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No. 10-383

In the
Supreme Court of the United States

NIBCO, INC.,

PETITIONER,

v.

MARTHA RIVERA, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Ninth Circuit below vitiated a 7-week trial without the courtesy of a remand by second-guessing a trial court's findings under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on new arguments and evidence raised for the first time on appeal. Respondents' opposition tries to sow confusion, denying that the Ninth Circuit's decision is an outlier and that lower courts are divided over when comparative-juror analysis is required. But respondents' arguments disintegrate on examination. The Ninth Circuit has squarely held, in both the decision below and in a prior *en banc* case, that comparative-juror analysis is mandatory and that comparative-juror arguments are exempt from ordinary rules of forfeiture. That position conflicts with approaches taken by other courts of appeals. And it cannot be reconciled with this Court's precedents, which have warned of the dangers of appellate fact-finding and emphasized that trial court *Batson* determinations should be reviewed only for "clear error." The Court's intervention is needed to correct the Ninth Circuit's doctrinal departures and to provide much-needed guidance to the lower courts.

More fundamentally, respondents' opposition confirms that, at a minimum, the Court should summarily reverse the Ninth Circuit's decision to order a new trial without remanding for the trial court to consider the new arguments and evidence raised for the first time on appeal. Contrary to respondents' assertions, the issues are far from undisputed. A remand is thus required for the trial judge, who is best-positioned to conduct *Batson*'s

fact-intensive, credibility-based inquiry, to determine whether, as respondents assert, petitioner's counsel purposefully discriminated when striking prospective juror TG or whether, as petitioner maintains, the Ninth Circuit seized upon baseless accusations to force re-litigation of claims that were fairly litigated and properly rejected by a racially diverse jury.

I. The Court Should Grant Plenary Review To Clarify When A Comparative-Juror Analysis Is Required On Appeal.

1. Respondents contend that review is not warranted because most *Batson* challenges arise in criminal appeals and, therefore, resolving the questions presented in this civil case would not provide meaningful guidance to the lower courts. Opp. 8–9. But respondents cite no authority establishing that *Batson* applies differently in the criminal and civil contexts. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) ("same approach" applies in both contexts). The Second Circuit has recently held that, for *Batson* purposes, there is "no principled basis for distinguishing between civil and criminal cases." *United States v. Martinez*, 621 F.3d 101, 107 (2d Cir. 2010). And the Ninth Circuit specifically noted below that it has never recognized any such distinction. Pet.App. 3 n.3.[1] A decision from this Court clarifying

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[1] The Fifth Circuit, by contrast, has distinguished the capital context from both the non-capital and civil contexts. *See supra*. Granting plenary review could resolve that subsidiary split as well. Moreover, granting review in a civil case and clarifying whether the rules apply uniformly

(i) whether comparative-juror analysis is mandatory, and (ii) whether ordinary rules of forfeiture apply would thus provide critical guidance in both the criminal and civil contexts.

To be sure, the standard of review under the Antiterrorism and Effective Death Penalty Act ("AEDPA") is more demanding than "clear error" review. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). But courts in the Ninth Circuit have held that even AEDPA's demanding standard is satisfied when a state court fails to undertake a comparative-juror analysis. *Reynoso v. Hall*, No. 08-15800, 2010 WL 3516410, at *3 (9th Cir. Sept. 7, 2010); *see also id.* at *8–9 (Callahan, J., dissenting). Moreover, that the failure to undertake comparative-juror analysis is often debated in the section 2254 context underscores that this is a rare opportunity for the Court to provide direct and definitive guidance on an important, recurring issue without couching its decision in terms of AEDPA's standard of review. If this Court decides that it is not "clear error" for the district court to fail to conduct comparative-juror analysis *sua sponte*, that will resolve the AEDPA questions, *a fortiorari*, and decide the issue once and for all.

2. Respondents next assert that comparative-juror analysis is not actually "mandatory" in the Ninth Circuit and "there is no clear rule concerning 'forfeiture.'" Opp. 9–10. But that is directly contrary to respondents' position below, where

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in civil, non-capital criminal, and capital contexts is surely a better option than reviewing *Batson* only in capital cases.

respondents argued that "comparative juror analysis is required—both on the part of the trial court ... and by reviewing courts 'even when it was not requested or attempted in the [trial] court." Resp. CA9 Reply 14 (emphasis in original). To support that position, respondents quoted the Ninth Circuit's *en banc* decision in *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006), which interpreted *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), as establishing that "comparative analysis is required even when it was not requested or attempted" before the trial court. *Kesser*, 465 F.3d at 361. Although respondents suggest that other Ninth Circuit panel decisions have struggled to apply *Kesser*, that hardly renders the *en banc* decision non-binding or Ninth Circuit law unsettled. Rather, it suggests that even some panels bound by that *en banc* decision bristle at its un-workability. Moreover, respondents' suggestion that comparative-juror analysis is a non-mandatory "tool," Opp. 10, 18 n.10, was recently rejected by another Ninth Circuit panel, which (like the court below) held that "courts must conduct comparative juror analyses when considering *Batson* objections." *Reynoso*, 2010 WL 3516410, at *3 (citing *Kesser*); *cf. id.* at *7 (Callahan, J., dissenting).

3. As the petition explains, the Ninth Circuit's extreme position directly conflicts with decisions from other courts of appeals. Pet. 18–22. Respondents seek to downplay these divisions, but they do not deny that there is widespread confusion among the lower courts. If anything, respondents' opposition indicates that the confusion is even *greater* than the petition suggested.

Respondents in any event do not fairly describe the relevant precedent. For example, respondents get the law of the Sixth Circuit backwards in narrowly construing *United States v. Cecil*, 615 F.3d 678 (6th Cir. 2010), and broadly construing *United States v. Torres-Ramos*, 536 F.3d 542 (6th Cir. 2008). Opp. 10–11 & n.6. *Cecil* clarified that *Torres-Ramos* stands only "for the simple premise that, when a district court conducts comparative juror analysis, it is under an obligation to get it right," but it need not undertake it if "neither party argues for such analysis." 615 F.3d at 687. According to the Sixth Circuit, *Miller-El II* "says nothing of a trial court's responsibility to adduce evidence when the challenging party fails to do so." *United States v. Katuramu*, Nos. 04-3633, 04-3722, 2006 WL 773038, at *3 (6th Cir. Mar. 28, 2006). In conflict with the Ninth Circuit, the Sixth Circuit thus does not view comparative-juror analysis as mandatory or exempt from ordinary rules of forfeiture.

Respondents also mischaracterize the Fifth Circuit's jurisprudence, dismissing any distinction between capital and non-capital cases as a relic of pre-*Miller-El II* authority. But *Woodward v. Epps*, 580 F.3d 318 (5th Cir. 2009), which post-dates *Miller-El II*, unambiguously distinguished civil and non-capital criminal cases from capital cases. In particular, *Woodward* reaffirmed that principles of forfeiture apply in civil and noncapital criminal cases, but noted that "[c]apital cases employ different standards ... at times" and that "waiver does not apply in capital cases." *Id.* at 338.

Respondents also rely on two other Fifth Circuit cases, *see* Opp. 15, but neither embraces the Ninth Circuit's approach. *See United States v. Williams*, 610 F.3d 271, 283 n.13 (5th Cir. 2010); *United States v. Brown*, 553 F.3d 768, 796–97 (5th Cir. 2008). In *Williams*, the court merely rejected the suggestion that, although appellant had raised a comparative-juror argument before the trial court, it had not raised the argument with sufficient specificity. 610 F.3d at 283 n.13. In *Brown*, no party appears to have argued forfeiture (and, of course, it is possible to forfeit a forfeiture argument, *see, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 459–60 (2004)). Moreover, in both cases, the Fifth Circuit rejected the *Batson* challenge and upheld the trial court.

Respondents relegate their discussion of Eleventh Circuit case law to a footnote, *see* Opp. 15–16 n.9, but that cannot obscure its conflict with the decision below. In *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), the Eleventh Circuit did not undertake a comparative-juror analysis because it concluded that *Miller-El II* controlled only in cases involving similarly "augmented record[s]" and limited its review to the "'evidence presented'" below. *Id.* at 1070 & n.6. That *Hightower* treated the comparative-juror issue as forfeited was plainly the understanding of the dissent, which criticized the majority on grounds that "comparative juror analysis is further evidence of a *Batson* violation that the trial court *could have* considered ..., *whether counsel made the argument or not.*" *Id.* at 1076 n.6 (Wilson, J., dissenting) (emphasis added).

Finally, respondents' attempt to recast *Lamon v. Boatwright*, 467 F.3d 1097 (7th Cir. 2006), is

unavailing. Opp. 13. Respondents contend that *Lamon* viewed comparative-juror analysis as "*unnecessary*," *id.*, but the relevant point is that the Seventh Circuit majority did not view comparative-juror analysis to be "required on appeal."

In short, respondents have not, and cannot, point to any consistently applied rule that harmonizes the disarray among the circuits. Unlike the Ninth Circuit below, courts in other circuits have not adopted the rule that "a comparative juror analysis is required on appeal, even when ... it was not requested or attempted below." Pet.App. 3.

4. Respondents next contend that the Ninth Circuit's decision "simply did as this Court did in *Miller-El [II]*." Opp. 17. Citing *Miller-El II*'s second footnote, respondents argue that comparative arguments were fairly presented because they were generally encompassed in "theories about th[e] evidence" presented below. Opp. 18. But respondents neglect to mention the footnote's very next paragraph, which recognized a "question" as to whether certain "juror questionnaires" and "juror information cards" were properly before the lower courts. 545 U.S. at 241 n.2 & 256 n.15. Because the materials were acquiesced to and "expressly relied on" by the state, however, the Court had "no occasion ... to reach any question about waiver." *Id.* at 256 n.15.

That the Ninth Circuit's position is out-of-step with this Court's decisions is further underscored by respondents' treatment of *Snyder v. Louisiana*, 552 U.S. 472 (2008). Respondents make the remarkable assertion that *Snyder* relied on a "'cold appellate record' ... to reverse the Louisiana trial and

supreme courts." Opp. 21. In fact, *Snyder* warned that "a retrospective comparison of jurors ... may be very misleading when ... not raised at trial" and explained that the record there was *not* a "cold appellate record" because the issue had been "*thoroughly explored* by the trial court." 552 U.S. at 483 (emphasis added).

Nothing in *Miller-El II* or *Snyder* suggests that this Court has mandated comparative-juror analysis in every case or exempted *Batson* claims from the ordinary rules of forfeiture. Indeed, this is the point recognized in Judge Rymer's dissent in *Kesser*, which contrary to respondents' suggestions, Opp. 20 n.12, squarely addresses forfeiture. Judge Rymer objected to the majority's comparative-juror analysis because "[n]o evidence was presented, no arguments were offered, [and] no findings were sought" in the trial court. 465 F.3d at 377 (Rymer, J., dissenting). As she explained, "appellate judges should not purport to undertake such a fact-intensive process," for "there is no clearly established law" requiring comparative-juror analysis to be undertaken for the first time on appeal. *Id.*

5. Respondents complain that petitioners are demanding "insatiable," "unbounded" deference to trial courts. Opp. 22. In fact, petitioners merely seek to enforce the "great deference upon appeal" that this Court has mandated in *Batson* cases. *Hernandez v. New York*, 500 U.S. 352, 364 (1991). The Ninth Circuit was able to claim "clear error" below only by fundamentally transforming the meaning of that standard. Where there were "two permissible views" of the evidence, *id.*, the Ninth Circuit insisted that its own view had to prevail.

For instance, where TG had effusively expressed positive feelings about her former employer, and noted that her former employer's workplace was multi-lingual, the Ninth Circuit concluded that it was "clear error" to put two and two together and infer that she had positive feelings about her former multi-lingual workplace. It also second-guessed the trial court's evident conclusion that petitioner's counsel merely misspoke when he mistakenly stated that TG's sister had filed a discrimination claim and then corrected himself, adding "Or not." Pet.App.50.

6. The decision below is thus not supported by "alternative and independent grounds." Opp. 24. To the extent it relies on alleged factual misrepresentations, those "errors" were found only by subverting the "clear error" standard of review. Not every mistake is evidence of racial animus, and the context and credibility that the district court was in a unique position to judge are the keys to differentiating honest mistakes from pretext.

II. The Court Should Summarily Reverse The Decision To Order A New Trial.

Respondents' opposition, accompanied as it is with 205 pages of appendix materials, confirms that the Ninth Circuit engaged in improper appellate fact-finding and that this Court should at a minimum summarily reverse its decision to vitiate the trial without remand.[2] Even assuming

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[2] Respondents quibble with the length of the trial, suggesting that it lasted only 27 days. Opp. 5. In fact, proceedings commenced on October 8, 2008, and were completed 49 days later on November 26, 2008. (The

respondents could make a *prima facie* showing of possible discrimination, the trial judge who conducted voir dire deserved the opportunity to consider the new evidence and arguments. The trial judge is in a far better position than the court of appeals to make the factual findings required to determine whether counsel purposefully discriminated.

1. Respondents assert that no remand is required because the trial court "ignored in the first instance" the "evidence" considered by the Ninth Circuit. Opp. 27, 29. But it is respondents and not the trial court that "ignored" the evidence; the whole problem here is that respondents did not bring to the judge's attention the very arguments and evidence that they now assert he overlooked. At no point before the trial court did respondents ever seek to compare TG to any other juror or raise any of the other arguments they now press in an attempt to prove up their alleged *Batson* violations. At trial, respondents objected to only two of petitioner's four race-neutral explanations for striking TG and, with respect to those two explanations, they objected on different grounds from the grounds on appeal. At no point did respondents object about counsel's mistaken (promptly corrected) comment that TG's sister had filed a discrimination claim, or his inference that TG

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petition inadvertently referred to a 52-day trial). Any way you count them, the Ninth Circuit's decision effectively rendered all those trial days—a substantial percentage of the trial court's work year—for naught, without even the courtesy of a remand.

had loved her former multi-lingual workplace. *Id.* It is hard enough to believe that comparative-juror analysis, like standing and jurisdiction but unlike everything else, can be raised for the first time on appeal. It is even harder to believe that disputes of evidence and credibility should be definitively resolved by the court of appeals without a remand to the district court who oversaw the voir dire.

2. Respondents also feign confusion over "what precisely" should "occur on remand," contending that "all of the relevant facts are known and undisputed." Opp. 27. But this is wishful thinking. Unlike the cases respondents cite, where "all the evidence" was "documentary" and the facts undisputed, *Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 118–19 (5th Cir. 2008), here the most important facts are hotly disputed and turn on real-life credibility determinations. Respondents' cases do not address the situation where, as here, the trial judge is ready, willing, and uniquely able to consider the issues on remand. *See* Opp. 29–30 & n.17 (citing *Reed v. Quarterman*, 555 F.3d 364, 382 (5th Cir. 2009) (case involving proceedings "more than thirty years after the crime took place")).

Batson's fact-intensive inquiry is supposed to allow the trial court, with its broad appreciation for the totality of circumstances, to "undertake 'a sensitive inquiry,'" *Batson*, 476 U.S. at 93, into counsel's "state of mind based on demeanor and credibility." *Hernandez*, 500 U.S. at 361, 364–65. In this case, that would require the trial judge to address the arguments and evidence that, as the Ninth Circuit admitted, respondents "did not specifically point out below." Pet.App. 3. And it

would require the trial judge to determine whether, as respondents maintain, petitioner's counsel purposefully excluded prospective jurors because of their race or whether, as petitioner maintains, there were at most some errors of fact that do not remotely give rise to an inference of pretext.

3. Respondents assert that the *Batson* violation "was apparent even in the absence" of a factual finding "regarding counsel's demeanor" and that TG's demeanor is irrelevant. Opp. 28. But that is not true. Whether counsel's stated reasons for striking TG were "supported by the record" and, if not, whether they were sufficient to justify an "inference" of discriminatory pretext cannot be resolved on a cold appellate record with no appreciation for counsel's credibility and TG's demeanor.

The accusation that an officer of the court has acted with purposeful discrimination deserves serious consideration by the trial court, which is ideally situated to consider it. In this case, where respondents' discrimination claims were rejected by a racially diverse jury, it is unsurprising that they seek a complete do-over rather than a proper remand. Ordering a remand is therefore all the more critical to ensuring that *Batson* is not transformed into a strategic weapon to be used anytime a plaintiff or court of appeals is disappointed by a jury's verdict.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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